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THE COMMUNITY SENTENCE
IN THE CONTEXT OF EUROPEAN STANDARDS
AND SERBIAN CRIMINAL LEGISLATION

Summary

The goal of the research is to determine how the community service sentence has been shaped nomotechnically; what has been the scope of its application, as well as what is the relationship between its normative and implementation levels. Comparative, normative and legal-dogmatic method will be used in order to draw conclusions about the main possibilities and limitation of criminal law repression in the contemporary discourse. This is followed by statistical data, which serve as a basis for an analysis and comparison between the expected and achieved effects of the analysed norms.

In the concluding considerations, the authors state that the punishment of community service has been and remains a pillar of attitudes regarding the need to promote more active participation of the broader social community in the criminal justice system. Although its ratio legis is embodied in avoiding harmful aspects of the sanction of deprivation of liberty by increasing the potential for processes of reintegrating the convicted person into the society, and reducing both stigmatization on the one hand, and the costs of the penal system on the other, the authors conclude that there is a profound gap between the expected positive implications of the punishment and its actual effects in practice.

Keywords: community sentence, national criminal legislation, penal policy, harmonization, possibilities, limitations.

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KAZNA RADA U JAVNOM INTERESU U KONTEKSTU EVROPSKIH STANDARDA I KRIVIČNOG ZAKONODAVSTVA SRBIJE

Sažetak

Cilj istraživanja je da se utvrdi kako je kazna rada u javnom interesu nomotehnički uobličena, koji je opseg njene primene, kao i kakav je odnos njenog normativnog i aplikabilnog nivoa. Uporednopravni, normativni i pravnodogmatski metodi su korišćeni radi izvođenja zaključaka o načelnim mogućnostima i ograničenjima krivičnopravne represije u savremenom diskursu, čemu slede statistički podaci, kao osnova analize između očekivanog i ostvarenog dejstva analiziranih normi.

U zaključku autori konstatuju da je kazna rada u javnom interesu bila i ostala stub stavova o potrebi promocije aktivnijeg učešća šire društvene zajednice u krivičnopravnom sistemu. Iako je njen ratio legis oličen u izbegavanju štetnih aspekata kazne lišenja slobode, povećanju potencijala reintegracionih procesa osuđenog lica u društvo i smanjivanja sa jedne strane stigmatizacije, a sa druge strane troškova penalnog sistema, autori konstatuju da postoji duboki jaz između očekivanih pozitivnih implikacija kazne rada u javnom interesu i njenog ostvarenog dejstva u praksi.

Ključne reči: kazna rada u javnom interesu, nacionalno krivično zakonodavstvo, politika kažnjavanja, harmonizacija, mogućnosti, ograničenja.

1. Instead of Introduction - General Remarks on European Standards Regarding Community Sanctions and Measures

Theoretical consideration on finding effective mechanisms within the framework of the criminal law response to crime through the selection and application of criminal sanctions include considerations of potential alternatives to the basic repressive measure of imprisonment. The position that the prison sentence has “reached the limits of its possibilities and is accompanied by a not so small a number of negative phenomena both for the convicted person and the society that applies it” (Bejatović, 2018, p. 13) has led to the consideration and subsequent acceptance of modern international and European trends in the field of penal policy and harmonization of regulations pertaining to criminal law matters in the Republic of Serbia.

Although the need for a uniform view of penal policy at the European level is not a condition *sine qua non* for the accession of the Republic of Serbia to the European Union (EU), it is most indicative of the degree of alignment of regulations with European standards in this emphatically repressive area of the state response to crime.

The 1990 United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the 1992 Recommendation No. R (92)16 on the European Rules on community sanctions and measures deserve to be mentioned as forerunners of the documents directly related to the introduction of community service at the supranational and European level.

These documents later received their elaboration and concretization through the activities of the Council of Europe, which developed special standards in the field of penal law, set out in texts of binding contents such as conventions and protocols, but also in the jurisprudence of the European Court of Human Rights on deprivation of liberty and imprisonment. In addition to this, elaborate standards have been established in the so-called non-binding texts, such as recommendations of the Committee of Ministers and the annual general reports of the Council of Europe Committee for the Prevention of Torture.

The Council of Europe documents, such as Recommendation Rec (2000) 22 of the Committee of Ministers to member states on improving the implementation of European rules on sanctions and measures in the community and Recommendation R (2017) 3 of the Committee of Ministers on European rules on sanctions and measures in the community, promote the importance of introducing the sentence of community service listing, by way of argumentation, the reasons for adopting this alternative criminal sanction such as: the absence of deviations in the social life and contacts of the convicted person, lower execution costs, potential positive influence of citizens on the convicted person, its educational potential, a more active participation of the broader social community in the criminal justice system, and avoiding the harmful aspects of a custodial sentence.

Chronologically speaking, most of these documents precede the adoption of community service as a separate punishment in the system of criminal sanctions in the Republic of Serbia and are primarily aimed at establishing certain standards striving towards building a more humane and efficient penal system based on the fundamental premise that imprisonment should be used as an *ultima ratio* measure, that every measure must be based on the law, the consent of the person upon whom they are imposed and executed, developing awareness of the status of 'real sanctions' which correspond to certain categories of criminal offences, restricting the right of a convicted person only to the extent that is necessary, participation of the local community, ensuring public support and cooperation.

2. The Community Service – Comparative and Serbian Law Perspective

Although some experts in the field of criminal law put forward proposals aimed at introducing the community service as a criminal sanction in the national criminal legislations back in the 1990s, it was not accepted at the time on the grounds that there were no adequate conditions for its execution. As part of the reform of the criminal legislation of the SFRY, in 1990, a draft article was prepared and proposed, which referred to the introduction of the penalty of community service, but the article was not accepted and was not included in the draft text of the General Part of the Criminal Code. The idea and proposal to introduce this alternative criminal sanction was realized 16 years later. This is an excellent example of the fact that the influence of the criminal law dogmatics is not given the importance that it deserves and that the lawgiver accepts some solutions late in relation to the general development of ideas, institutes, and alternatives to existing criminal law institutes. If the indiscriminate application of the solutions accepted in the relevant documents also infrequently constitutes the staple and the basis of changes in the national legislation, then the proven legal dogmatic solutions accepted in the comparative criminal law theory and legislation should and must have a significantly stronger influence on the legislator. This is an outstanding example of how dogmatists can launch certain initiatives in a timely manner and in harmony with internationally accepted solutions, yet, for political reasons, the legislator fails to recognize them timely and therefore noticeably delays the standardization and applicability of the norms accepted so late. It is not surprising then that there is a gap between the standards in the observed field and the national judicial practice. However, a decade and a half later, it found its place in the system of criminal law provisions as a punishment within the criminal law system.

Upon the introduction of community service, European legislations and their positive experiences served as a useful landmark and a model in the context of a classic comparative law model, since community service proved to be the most successful of all alternative criminal sanctions.

Community service has been introduced in a large number of European criminal legislations, including those of Germany, England, Wales, France, Ireland, Italy, Switzerland, Spain and Portugal (Stojanović, 2019, pp. 235-236).

It was first prescribed in England and Wales in 1972 within the *Criminal Justice Act*, then in Northern Ireland, Scotland and the Republic of Ireland, and in the 1990s in other European legislations as well. It was accepted in the legislations of the so-called Old Commonwealth -Australia, New Zealand, South Africa and Canada (Mrvić Petrović, 2018, p. 152).

The name of this penalty differs in various criminal legislations. In the CC of Denmark (Langsted, Garde & Greve, 1998, p. 99) and CC of the Netherlands (Rayer & Wadsworth, 1997, p. 52) e.g. it is called “social community service”, Spanish CC (Valle Muniz, Morales Garcia & Fernandes Palma, 1997, p. 124) and the CC of Portugal (Codigo penal, 1997) refer to it as “service for the societal benefit” (*trabajos en beneficio de la comunidad*, i.e. *trabalho a favor da comunidade*). CC of the Russian Federation (Скуратов & Лебедев, 1996, p. 102) refers to it as “obligatory work/labor” (*обязательные работы*), French CC (Nouveau Code pénal, 1993, p. 23) as “work in the general interest” (*travail d’intérêt general*) and the CC of Croatia¹ – “work for the public benefit”. Criminal Code of Montenegro² calls this penalty “work for the general interest”. CC of the Russian Federation also stipulated the penalty of the “correctional work” (*исправительные работы*) (Скуратов & Лебедев, p. 102), though it is in its essence significantly different compared to the community service penalty, hence not suitable for comparative legal approach.

The solution offered by the national legislator in the Criminal Code (CC) of 2006 differed conceptually from almost all other European legislations as they did not envisage the community service as a punishment. Thus, Serbia was among the pioneers in terms of giving the community service the character of punishment and a principal one at that. In numerous other European legislations, community service is either just a possibility in the process of executing the sanction of deprivation of liberty or its legal nature is not explicitly defined. The fact is that the legislation of Switzerland, which followed the Serbian national legislation in providing for community service as the main punishment, showed that this did not contribute to its more frequent use in practice. On the contrary, the experience of Switzerland indicated that the alternative criminal sanction was used more often during the period when it was envisaged only as a possibility (Stojanović, 2015, p. 18, fn. 41).

In the process of its transformation, since the adoption and entry into force of the 2006 CC (Criminal Code-CC) the criminal legislation of Serbia has complemented its system of criminal sanctions by introducing new types of punishment or, more precisely, alternative sanctions: the community service and the revocation of a driver’s licence. The starting point upon their introduction was the idea to reduce the punishment of deprivation of liberty to the optimal minimum and fundamentally promote its alternatives, the positive effects of which are directly proportional to the negative effects of imprisonment, that is, deprivation of liberty.

¹ *Narodne novine* [Official Gazette of the Republic of Croatia], Nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022 and 114/2023 Available at: www.zakon.hr (29. 9. 2022)

² Available at: www.gov.me/dokumenta/c4dcee51-ee88-430f-a8db-de91f38eadc4 (2. 2. 2024)

Although the process of changes and development of the criminal legislation began with the adoption of the 2006 CC, predominantly characterized by an emphasized dynamic³, as well as punitive populism and the tightening of repression (Bodrožić, 2022, pp. 392-393), the sanction of community service is considered in this paper as a counterweight to these negatively characterized criminal policy tendencies and is designated as the pillar of views on the need to promote more active participation of a broader social community in the criminal justice system, to avoid harmful aspects of the sanction of deprivation of liberty, and increase the potential of processes of reintegration of the convicted persons into society, as well as to reduce stigmatization, on the one hand, and the costs of the penal system, on the other.

Its limitations are observed in the broader context of the lack of an appropriate level of cooperation between the subjects within the judicial system, as well as the resistance of judges towards extra-institutional sanctions, as a direct consequence of the system's rigidity, reluctance to adapt, and conforming to the populist and punitive rhetoric of the wider public discourse.

3. Advantages and Disadvantages of the Community Service

A lot has already been written about the numerous positive effects of applying the community service in the myriad of theoretical papers dealing with this alternative criminal sanction. In this context, the moral and educational aspects of this sanction are especially emphasized. Such service does not have a retributive character and it is not meant to be some evil by which the society 'revenge' against one who violated its norms of conduct. On the contrary, its nature should be that of honourable compensation by the offender to the society for the violation of the protected object. The work itself should thus have a corrective effect on perpetrators and, in a manner, lead to their rehabilitation. In order to achieve this, the Code stipulates that the work must be done in the public interest, i.e., it has to be beneficial for the society as a whole, and not only for a company, an enterprise or an individual; that it must not be humiliating for the perpetrator, and that it is not performed for profit.

On the other hand, bearing in mind that this sanction is mainly used as a substitute for short-term prison sentences, its application means avoiding all the adverse consequences that the prison sentences entail, such as separation from home and family, disruption of family relations, absence from work, frequently a

³ The statute was amended seven times from the time it was adopted to the moment of writing this paper.

loss of job, negative reaction of the environment, bad influence of the prison environment, and the frequently noted impossibility of resocialization (Atanacković, 1988, p. 94; Lazarević, 1974, p. 44). This avoidance of imprisonment, as the main goal of the application of this punishment, is possible in situations where the severity of crime requires that the perpetrator has to be punished, but the characteristics of the perpetrator's personality are such that it can be justifiably believed that the purpose of punishment will be achieved even without his imprisonment.

There are almost no disagreements in the works of theoreticians who have focused on this punishment regarding the mentioned positive aspects and advantages that this punishment entails in relation to the prison sentence. However, the manner in which this penalty is defined in our CC leaves some dilemmas and some open questions, the resolution of which could eliminate some shortcomings in the application of this penalty and ensure its wider and more consistent application.

First of all, the question arises as to whether imposing community service as a punishment is the best solution. It has actually been devised as a substitute for punishment, so it seems that its treatment as a separate criminal law measure would be theoretically more justified. Yet it is not a purely theoretical issue, as it has certain practical implications that are manifested in the application of some general institutes of criminal law, such as determining a sanction for joinder of offences (Đorđević, 2019, p. 213) or determining a sanction to a convicted person (Đorđević, 2008, p. 166) statute of limitations, etc. The assumption remains that, by giving it the rank of a principal punishment, the legislator wants to strengthen its position in the system of criminal sanctions (Stojanović, 2020, p. 319).

It is especially illogical that the CC stipulates (Article 44 CC) that the punishment of community service can be imposed both as the main and the secondary punishment. If something is theoretically conceived and introduced into the criminal legislation with the idea of replacing the punishment in certain cases, there is no justification for imposing such a punishment as secondary to the punishment it is supposed to substitute (Stojanović, 2019, p. 260). This possibility did not exist at the time of adoption of the CC from 2005, but was introduced by its amendments from September 2009. Fortunately, to the best of our knowledge, it has almost never been used in practice. Therefore, the idea of removing this provision from the CC seems completely justified (Pavićević, 2022, p. 70).

The penalty of community service is not prescribed in the CC for any specific criminal offence. This is logical if we treat this sanction only as a substitute for punishment, but if we consider it as a separate punishment, then the solution could be different. There is no reason why this punishment could not be stipulated for certain less serious crimes, alternatively with a prison sentence, and even a fine (e.g. for an insult). We have such an example in our misdemeanour law,

where there is also a punishment of community service, which is prescribed as an alternative to a prison sentence or a fine for certain offences under the Law on Public Order and Peace (Đorđević, 2021, p. 109).

Given that it has not been prescribed for any specific crime, the penalty of community service is always determined and pronounced within the limits of its general minimum and maximum. This is neither logical nor justified if one takes into account that this sentence can be imposed for different criminal offences of very different severity, which only have in common that they are punishable by imprisonment of up to three years or a fine. This practically means that the community service is determined and pronounced in the same range both when it comes to a criminal offence punishable by imprisonment of up to six months and the one punishable by imprisonment of up to three years. If there had been no desire to determine special minimums and maximums of this punishment for individual criminal offences, this inconsistency could have been avoided by linking the penal frameworks of this punishment for individual criminal offences to the framework of the prescribed prison sentence, something similar to regulating the sanction of fine. In this way, the only thing left for the court to do when determining the community service sentence, bearing in mind the purpose of punishment, is to “have regard to the type of committed criminal offence, personality of the perpetrator, and his readiness to perform community service”, acting within the framework of the general minimum and maximum of this sentence, regardless of the criminal offence in question. It is especially striking that the Code mentions only the type of crime committed as a criterion for sentencing, and not its severity, which is utterly unacceptable, because it is not in accordance with the basic principle that the punishment should be proportionate to the severity of the crime. Considering that it is difficult to find any justification for this kind of wording, we can only believe that it is merely an editorial error.

It seems that some of these objections could have been forestalled if the legislator had opted for a system according to which a determined sanction and not a prescribed sentence appears as a condition for the imposition of such a sentence, as in the case of a suspended sentence or house arrest. The advantages of such a system would be multiple. First of all, the possibility for imposing community service would be linked to a specific committed offence and the punishment envisaged for it, and not the abstractly prescribed punishment for that act. This would allow for the punishment to be imposed for serious crime as well if in a specific case it constitutes a less serious crime, and it would not be possible if it was a less serious crime which appeared in a more serious form. The current provisions do not allow the imposition of community service for a criminal offence punishable by a penalty of imprisonment in excess of three years, regardless of

whether the offence in the specific case was a less serious manifestation, or even where there are grounds for mitigating the sentence (e.g. voluntary abandonment, attempt, commission of crime under the influence of compulsive force or threat or in the extreme necessity, etc.).

Still, even in the case of such a decision, an upper limit should be set according to the envisaged punishment, and the offences listed for which this sentence cannot be pronounced, regardless of the sentence determined in the given case, as is the case with suspended sentence.

The advantage of tying the possibility of imposing community service to the determinate rather than stipulated sentence lies, among other things, in the fact the determinate sentence in a specific case already contains an assessment of the perpetrator's personality to which it must be adapted, which is not the case with the prescribed sentence. The assessment of the perpetrator's personality should be one of the key factors in imposing this sanction, which has been designed as highly suitable for certain categories of perpetrators (first-time offenders, negligent perpetrators, accidental culprits, traffic offenders, etc.) (Mrvić Petrović, 2018, p. 155).

Additionally, such a solution would mean that the perpetrator of a criminal offence, who is to be sentenced to community service and who is to declare beforehand whether he consents to such a punishment or not, actually has something concrete to declare, that is, he knows what this penalty substitutes, which is not the case with the current provision, because the perpetrator must plead without knowing what is being replaced (what he will be sentenced to if he does not accept the replacement) or what exactly is to be the substitute (what kind of service and for how long). It practically reduces his blank consent – given without awareness of what kind of alternative is offered to him and how favourable it may be for him – to a mere technicality, as the perpetrator gives his consent under the assumption that any kind of work is a more favourable option for him than any prison sentence. Nevertheless, the CC defines such consent as a necessary condition in order to reject the objection that this punishment represents a form of forced labour, which is inadmissible from the point of view of respect for human rights and also contrary to the national Constitution (Article 26, paragraph 3 of the Constitution of the Republic of Serbia), as well as international conventions (European Convention on the Protection of Fundamental Human Rights and Freedoms of November 4, 1950 and International Convention of the Prohibition of Forced Labour No. 105, of June 25, 1957).

In relation to the necessary consent of the perpetrator to be sentenced to community service there is no provision in the regulations or a single view in practice regarding the point of time at which the perpetrator is to give his consent to this penalty, which implies that it can be done throughout the trial but it is obviously

the most logical to occur following the completion of evidentiary proceedings and before the conclusion of the trial (Tešović, 2020, p. 23) at the latest during delivering the closing argument (Vuković, 2021, p. 462). The consent to this sanction does not in itself imply admission of having committed a criminal offence, which is supported by judicial practice⁴ and this was also the position taken by the Court of Appeal in response of the judges of the Criminal Division of this court to the question of the lower-instance courts at its session held on October 30, 2014.⁵ Yet in practice, this penalty, as a rule, occurs in cases where the perpetrator confesses the commission of a criminal offence (Tešović, 2022, p. 255).

The community service is intended as an alternative to a prison sentence. However, the wording of Article 53 of the CC which stipulates this punishment allows for its implementation as a substitute for a fine. This is possible in two cases: if it replaces the fine for the committed criminal offence of insult (the only offence in the CC which is punishable by a fine) or if the convicted person fails to pay the fine to which he was sentenced following conviction for a criminal offence within the set period. It then indirectly appears as a substitute for imprisonment for unpaid fines that would otherwise be an alternative if there was no punishment of community service (Kiurski, 2010, p. 85). This, of course, by no means implies that the unpaid fine must be replaced by community service, but it is only a possibility, in addition to imprisonment, which is decided by the court. The judicial practice also speaks to this effect.⁶ Even in such a case, it is logical that the consent of the convicted person is necessary for the imposition of the sentence of community service, although this is not explicitly stated in the Criminal Code.

In connection with the replacement of an unpaid fine with the community service sentence, the question arises in practice as to whether an unpaid fine imposed for a criminal offence that does not meet the condition required for the imposition of community service (punishable by a stricter punishment than the one of three years imprisonment) can be replaced by this penalty. The point of view that is unanimously accepted both in theory (Tešović, 2022, p. 255) and in practice⁷ is that it is not possible because the opposite interpretation would

⁴ The decision of the Higher Court in Niš, Kž br. 651/16 of 17/01/2017 and the decision of the Basic Court in Niš K 49/16 of 06/09/2016) – *Bilten Višeg suda u Nišu* [Bulletin of the Higher Court in Niš], No. 34/2017, Intermex, Belgrade, Available at: www.propisionline.com (29. 9. 2022).

⁵ *Bilten Apelacionog suda u Beogradu* [Bulletin of the Appellate Court in Belgrade], No. 8/2016, Intermex, Belgrade, Available at: www.propisionline.com (29. 9. 2022).

⁶ The decision of the Basic Court in G. Milanovac Kv 38/18 of 30/03/2018 and the decision of the Higher Court in Čačak Kž 30/18 of 19/04/2018), Intermex, Belgrade, Available at: www.propisionline.com (29. 9. 2022).

⁷ The decision of the Basic Court in G. Milanovac, Kv. 60/16 of 15/4/2016 and the decision of

actually expand the field of application of the community service to offences for which this punishment it is not stipulated by law.

The CC also provides that this punishment can be replaced by a prison sentence in the event that the convicted offender fails to perform part or all hours of community service to which he/she was sentenced. The substitution is then carried out by replacing every eight hours of work with one day of imprisonment. This proportion is indirectly present in the replacement of an unpaid fine that can be replaced by a prison sentence (1,000 dinars = one day of imprisonment) or a sentence of community service (1,000 dinars = eight hours of work). It is easy to calculate that the longest sentence of community service (360 hours) in case of non-fulfilment of the obligation can be replaced with a maximum of 45 days of imprisonment. On the basis of this it can be concluded that the application of community service sentence as an alternative to a prison sentence makes sense only when it comes to a very light form of criminal offence for which a prison sentence of up to one and a half month would otherwise be imposed, and the court considers that there is no place for imposing a conditional sentence.

On the other hand, if the person sentenced to community service does good work and fulfils all of his obligations, the court may, at the proposal of the Commissioner, reduce his punishment by a quarter. Without questioning the justification of such a provision which is aimed at motivating the convict to perform good quality work, one may raise the question as to why the legislator did not opt for a reduction by a third by analogy with the institute of parole. The reduction cannot be applied if the community service represents an alternative for an unpaid fine, even if the convicted person fulfils all his obligations arising from the conviction, because the community service here is only a substitute resulting from the convict's failure to fulfill the obligations from the original sentence (Ćorović, 2015, p. 126).

All of the drawbacks that appear when it comes to community service as provided for in the national CC have been noticed by theoreticians and those who deal with the implementation of this sanction in practice almost immediately after its introduction into our criminal legislation in 2005. A lot has been written and discussed about it, many articles and books have been written, countless discussions and consultations have been organized. That is why it is somewhat surprising that in the past sixteen years, during which the CC was amended seven times, the legislators failed to heed the repeated objections and proposals *de lege ferenda* as regards this sanction and did not find it necessary to effect certain changes that would have make this sanction better and more applicable in practice.

the Higher Court in Čačak, Kž. 64/16 of 19/7/2016, Intermex, Belgrade, Available at: www.propisyonline.com (29. 9. 2022).

4. Community Service Sentence in Judicial Practice

4.1. Table 1: The total number of convicted persons sentenced to community service in the 2007–2020 period⁸

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Service	48	35	51	71	357	365	348	371	353	329	348	275	209	123

Table 1 shows the tendency in the number of persons legally sentenced to community service since its introduction (in 2006 there were still no such sentences which is logical considering that the Code implementation started on January 1, 2006, and this pertains to legally convicted persons) until 2020 (the Statistical Office has not yet published the data for 2021). After the first years of very rare, almost sporadic application of this penalty, since 2011 we have noticed a sudden increase in its application. This can be related with the adoption of the statute on amending the Law on the Execution of Criminal Sanctions from 2009⁹ which made significant changes in the provisions on the execution of this criminal sanction, which allowed for its simpler and more massive application. The number remained at approximately the same level for a while, only to register a significant decline in the number of convictions in 2018, amounting to only 123 convictions in 2020, which is only one third of the number of convictions in the 2007–2011 period.

The reasons for this trend can be varied, and probably multiple, but the following table may indicate one of them.

4.2. Table 2: The total number of persons legally sentenced to community service and house arrest in the 2015–2020 period¹⁰

Year	2015	2016	2017	2018	2019	2020
Community service	353	329	348	275	209	123
House arrest	1134	1858	2012	2205	2092	2113

Table 2 offers a parallel representation of the number of persons legally sentenced to community service and the sentence which is executed in the premises where the convicted person resides (the so-called house arrest) in the 2015–2020 period. The data unequivocally show that with the increase in the application of this variant of the prison sentence, the application of community service decreased.

⁸ *Bulletin of the Statistical Office of the RS*, Available at: www.stat.gov.rs (12. 6. 2022).

⁹ *Official Gazette of the RS*, No. 72/2009.

¹⁰ *Bulletin of the Statistical Office of the RS*, Available at: www.stat.gov.rs (12. 6. 2022).

Due to the short time interval in which this phenomenon is observed, it is difficult to draw conclusions with certainty, but certainly there are indications that the courts more often decided on house arrest than of community service (naturally, in cases where it is possible to impose both sanctions). If this is true, then this trend cannot be positively evaluated because these are completely different sanctions, intended for different perpetrators and subject to the fulfilment of different conditions. After all, as already stated, the community service sentence was conceived and introduced as a possible alternative for a prison sentence (and house arrest is still only a variant of a prison sentence), so it is not logical that house arrest should now somehow ‘replace’ the sentence of community service.

4.3. Table 3: The total number of persons legally sentenced to the community service for certain criminal offences in the 2016–2020 period¹¹

Criminal offence / Year	2016	2017	2018	2019	2020	Total
Light bodily injury	19	28	15	8	6	76
Endangering safety	11	10	8	7	5	41
Domestic violence	15	12	19	12	12	70
Failure to provide support/ alimony	12	14		8		34
Theft	128	130	93	76	37	464
Tax avoidance	7	5				12
Petty theft, embezzlement, etc.		6	6			12
Unauthorized use of vehicle			5	8		13
Concealing			10			10
Illegal drug manufacture	5	7				12
Possession of illegal drugs	35	44	44	34	26	183
Forest theft	7	10	20	12		49
Endangering public traffic	12	14	5	8	5	44
Vigilantism	18	20	9			47

Table 3 shows which criminal offences were most frequently punished by community service in the 2016–2022 period. By far the largest number of convictions was related to the criminal offence of theft which is to be expected considering the incidence of this criminal offence. In terms of the number of convictions, theft is followed by the criminal offences of unauthorized possession of narcotic drugs, followed by minor bodily injury and domestic violence. However, in order to get a more precise impression of the crimes for which this penalty was imposed in relation to the crimes for which it could have been imposed, or more precisely, to what extent this possibility was used for certain crimes, we would need information on the number of persons convicted of certain criminal offences which are punishable

¹¹ *Bulletin of the Statistical Office of the RS*, Available at: www.stat.gov.rs (12. 6. 2022).

by up to three years of imprisonment, which cannot be seen from the statistical data of the Statistical Office of the Republic of Serbia. Namely, these statistical data are based on the number of persons convicted of certain criminal acts, but not specific forms of those criminal acts, and there are many acts in which this punishment is envisaged only for some forms of the offence. In addition to this, even on the basis of the available data it can be concluded that the number of community service sentences is relatively small, so that with such small numbers even the differences that appear in certain criminal offences would not be sufficiently illustrative. The fact that the community service sentence is not most often pronounced for the lightest and most common criminal offences can be explained by the fact that a suspended sentence was most frequently imposed for these crimes as a criminal sanction that is more lenient than community service.

Regardless of the significant fluctuations in the application of community service, the previous tables indicate that the application of this penalty, even in the years when it was most often pronounced, is very low and barely reaches about 1% of the total number of legally convicted adults during one year. It certainly cannot be assessed as satisfactory considering the high expectations that existed when the penalty was introduced. What contributed to this, in addition to numerous technical and organizational issues, were certain imprecise and inadequate legal solutions, at least some of which pointed out in this paper.

5. Conclusion

As the percentage of imprisonment sentences in European countries ranges between 10% and 20%, according to the latest research, the Republic of Serbia has been classified in the group of states with an exceptionally high rate of incarceration because in 2019 the prison population amounted to 10,540 persons, which – observed from the aspect of incarceration rate was 159.9% – whereas the European average was 103.2% (Stojanović, 2019, p. 234; Kolaković-Bojović, Batričević & Matić-Bošković, 2022, p. 16). In the context of the topic of this paper, the above can be seen as a limitation of the community service sanction, since these are the data on incarceration of persons as many as 13 years since this sanction has been introduced.

In the annual report mentioned at the beginning of the paper, the Council of Europe Committee for the Prevention of Torture (CPT) dated April 22, 2022, a press release in connection with the Annual Report for 2021, points out the overcrowding of prisons and calls for limitation of the number of prisoners and wider application of extra-institutional sanctions.

Allan Mitchel, the chairman of the CPT, reminds that “governments should ensure that convicts have enough space for a dignified life in prison, as well as that extra-institutional sanctions are adequately applied in order to ensure adequate/proper protection of society by the criminal justice system.”

It reiterates that prison overcrowding is a consequence of the tightening of repression on the legislative level, the lack of recognition of the importance and a small proportion of extra-institutional sanctions.

We believe that this kind of reports represents a very important and useful landmark in assessing the extent of the application of the sanction of work in the public interest at the European and the national level.

Within the framework of repressive tendencies that characterize the process of dynamic changes in the national criminal law, public service has been a pillar of view on the need for promoting more active participation of the wider social community in the criminal justice system, avoiding the harmful aspects of the punishment of deprivation of liberty, increasing the potential of reintegration process of convicted persons into society, as well as reducing stigmatization on the one hand, and the costs of the penal system on the other.

However, the statistical data on the imposition of the penalty of work in the public interest over a whole decade of its application amounting to 1% of the total number of imposed criminal sanctions show that it was not used as a mechanism to reduce the prison population and that its application in judicial practice can be assessed as minor, negligible and certainly far from adequate to the basic idea.

It is indisputable that the opportunities identified in the paper as advantages of this type of punishment remained without adequate application at the level of applicability of the norm, and that in the end it can be stated that a deep gap exists between the expected positive implications of it and its effects of practice, improving the normative solutions in the direction of the given proposals *de lege ferenda*, but also strengthening the need for more intensive application of this type of punishment within the judicial chain.

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JOINDER OF THIRD PARTIES IN INTERNATIONAL ARBITRATION**

Summary

Multiparty arbitration has been recognized as an important feature in international arbitration and has consequently become an indispensable part of arbitration rules. With its inherent features and peculiarity, the provisions regulating multiparty proceedings are frequently ameliorated as they are constantly in the center of discussion among drafters and working groups, together with legal commentators. Arbitration rules were silent on the matter of a joinder for a long period. Gradually, joinder provisions have been introduced and are now being improved and enhanced with almost every revision of the arbitration rules. This paper discusses the joinder as one of the main mechanisms for transforming proceedings into multiparty proceedings. The author provides a comparative analysis of the joinder provisions under different sets of arbitration rules, focusing on key elements — the consent of the parties and the equal treatment of the parties.

Keywords: Multiparty arbitration, joinder, arbitration rules, third party, consent.

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PRISTUPANJE TREĆIH LICA U MEĐUNARODNOJ ARBITRAŽI

Sažetak

Mogućnost formiranja višestranačke arbitraže predstavlja važnu karakteristiku međunarodne arbitraže, te su posledično odredbe koje regulišu ovu materiju postale neizostavni deo arbitražnih pravila. Sa svojim inherentnim karakteristikama i specifičnostima, odredbe koje regulišu višestranačke arbitražne postupke često se unapređuju, budući da se konstantno nalaze u centru pravnih diskusija. Arbitražna pravila dugo nisu poznavala mogućnost pristupanja arbitražnom postupku. Vremenom se pravila o pristupanju trećih lica uvode, a takođe se i unapređuju skoro prilikom svake revizije arbitražnih pravila. Ovaj rad se bavi pitanjem pristupanja trećih lica arbitražnom postupku, kao jednim od glavnih mehanizama za pretvaranje arbitražnog postupka u višestranački. Autor pruža uporednu analizu odredaba o pristupanju arbitražnom postupku, analizirajući različita arbitražna pravila i fokusirajući se na ključne elemente pristupanja – saglasnost stranaka i jednak tretman stranaka.

Ključne reči: višestranačka arbitraža, pristupanje arbitražnom postupku, arbitražna pravila, treća lica, saglasnost.

1. Introduction

Multiparty arbitrations are not a novelty in the arbitration world (Born, 2021, p. 2759). The main mechanisms for transforming the proceedings into multiparty proceedings are consolidation, joinder, and intervention. In litigation, the courts are vested with the power to order the consolidation of proceedings and the joinder of third parties – such power “stems from the national court’s sovereign power” (Lew, Mistelis & Kröll, 2003, p. 389, paras. 16-39; see also Born, 2021, p. 2761). In arbitration, on the other hand, the arbitral tribunal derives its power from the arbitration agreement concluded between the parties (Lew, Mistelis & Kröll, 2003, p. 389, paras. 16-40; Voser, 2009, p. 350).

Over the years, there has been a noticeable increase in the number of commenced arbitrations involving more than two parties (Voser, 2009, p. 343; see also Vukadinović Marković & Popović, 2022, p. 188). Consequently, the leading arbitral institutions have modified their arbitration rules and have incorporated provisions to regulate the matter.

This paper will attempt to shed light on the issue of joinder by analyzing the key concerns when deciding on the joinder request. The author will consider the selected arbitration rules and each of their revised versions in the past 20 years regarding the matter of joinder, as well as the relevant case law. The author has selected the arbitration rules of the major arbitral institutions – Arbitration rules of the International Court of Arbitration of the International Chamber of Commerce (ICC Rules¹), Swiss Rules of International Arbitration of the Swiss Arbitration Centre (Swiss Rules²), Arbitration Rules of the London Court of International Arbitration (LCIA Rules³), Arbitration Rules of the Vienna International Arbitration Center (Vienna Rules⁴), Arbitration Rules of the Singapore International Arbitration Center (SIAC Rules⁵), Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC Rules⁶), China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC Rules⁷), as well as United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules (UNCITRAL Rules⁸). The author believes that certain provisions could be enhanced, since they may lead to inadequate or unjust results.

2. The Notion of the Joinder of Additional Parties

Envision the scenario – you and your friend have agreed to host a private gathering. All the necessary details have been discussed in advance – the purpose of the gathering, the place, the theme, the guest list, the menu. The invitations have already been sent, reservations have been made, and preparations are coming to an end. Everything seems to be set so the evening can start. But what happens in situations when one of the hosts wishes to invite additional person(s), or when a third person hears about the gathering and wants to join in? That person can be an acquaintance, a colleague, or perhaps a business partner who is expected to contribute in some way. Should they be allowed to join the gathering? What if the other host does not agree? What about the timing of the invitation?

¹ Art. 7 ICC Rules 2012, ICC Rules 2017, ICC Rules 2021.

² Art. 4 (2) Swiss Rules 2004 and Swiss Rules 2012, Art. 6 Swiss Rules 2021.

³ Art. 22 (1) (h) LCIA Rules 1998, Art. 22 (1) (viii) LCIA Rules 2014, Art. 22 (1) (x) LCIA Rules 2020.

⁴ Art. 14 Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

⁵ Rule 24 (1) (b) SIAC Rules 2007, SIAC Rules 2010, SIAC Rules 2013, Rule 7 SIAC Rules 2016.

⁶ Art. 14 (6) HKIAC Rules 2008, Art. 27 HKIAC Rules 2013, HKIAC Rules 2018.

⁷ Art. 18 CIETAC Rules 2015.

⁸ Art. 17 (5) 2010 UNCITRAL Rules, 2013 UNCITRAL Rules and 2021 UNCITRAL Rules.

Metaphorically explained in the simplest terms, however, the same questions are raised when the joinder mechanism is discussed.

3. What Is a Joinder?

The joinder refers to situations “where there are third party/ies or other party/ies to the agreement, depending on whether it is a ‘multiple parties to one contract’ or a ‘multiple parties to multiple contracts’ situation, and there is only one arbitration pending or initiated” (Platte, 2002, par. 8). The joinder should be differentiated from the “issue of ‘extension’ of the arbitration clause to non-signatories” (Hanotiau, 2007, p. 346), since the joinder answers the question “whether a non-party to the arbitration may intervene in the arbitration proceedings, once they have been initiated, or whether a party to the arbitration proceedings (Claimant on the one hand, Respondent on the other hand) may join a non-party during the arbitration” (Hanotiau, 2007, p. 346).

Commercial relationships have become more complex, leading to an increase in multiparty disputes (Bamforth & Maidment, 2009, p. 3; Blackaby et al., 2015, p. 32). Joinder is generally requested in the disputes arising out of joint venture or consortium agreements, construction projects, shareholders’ agreements, banking transactions, reinsurance contracts (Carrión, 2015, p. 479; Voser, 2009, p. 344; Bamforth & Maidment, 2009, p. 4). These are the types of disputes that “typically include more than two parties” (Voser, 2009, p. 344).

However, there are important issues to be considered when deciding on the joinder. Firstly, the consensual and “inherently private nature of arbitration” (Waincymer, 2012, p. 540) raises certain concerns with respect to the joinder. Secondly, the equal treatment of the parties cannot be disregarded either. Together, these aspects create difficulties for bringing third parties to the proceedings that can end with an undesirable outcome “since the lack of consent as well as any unequal treatment of the parties are grounds of resisting enforcement under the New York Convention” (Lew, Mistelis & Kröll, 2003, p. 378, par. 16-3; see also Jovičić, 2020, pp. 23-24).

4. Who Can Request a Joinder and Who Can Join the Proceedings?

Returning to the aforementioned scenario, it would be unusual to invite a complete stranger to a private gathering, or to allow just anybody to join in. Most likely, the hosts would invite their friends, colleagues, or business partners,

because they believe that the presence of the invitees could somehow be beneficial. What would be the benefits of having more people in the same room? How do you get on the guest list?

The involvement of multiple parties in the same proceedings can have a positive impact – procedural efficiency and cost efficiency can be increased, the risk of conflicting and inconsistent awards can be mitigated, whereas the matter of the dispute(s) can be comprehensively resolved in the same proceeding (Born, 2021, pp. 2762-2763; Voser, 2009, p. 350). These are the main advantages of joinder.

The request for joinder can be submitted either by the original party to the arbitration (joinder) or by the third party itself (“intervention-type joinder” (Choi, 2019, p. 31)). There are numerous reasons why the parties would request joinder; however, it all comes down to the question of liability. The claimant may assume that the respondent and a third party are jointly liable and therefore may request a joinder of the third party and submit a claim against both of them, saving time and avoiding additional costs (Voser & Meier, 2008, p. 116). Similarly, the respondent can request a joinder of a third party and submit a claim against the third party (Voser, 2009, p. 347), for example, a claim for recourse (Voser, 2009, p. 347; Voser & Meier, 2008, p. 116), and/or extend a counterclaim to that third party (Voser, 2009, p. 347; Bamforth & Maidment, 2009, p. 3). Finally, to protect its interests, a third party may request to be joined.

However, there are significant differences among different sets of arbitration rules. Some arbitration rules are more restrictive, and others have taken a more liberal approach.

For example, under Swiss Rules (Bärtsch & Petti, 2013, p. 63), HKIAC Rules 2013 and HKIAC Rules 2018 (Moser & Bao, 2017, p. 210, para. 10.15; Smith, 2018, p. 189), Vienna Rules (Pitkowitz, 2015, p. 310, para. 73), SIAC Rules 2007 (Voser, 2009, p. 400), and SIAC Rules 2016 (Dulac & Lo, 2016, p. 113; Born, 2021, p. 2806; Smith, 2018, p. 189; Choi, 2019, p. 49), the request for joinder can be submitted either by the party to the arbitration or the third party. UNCITRAL Rules stipulate that the third party can request joinder only if it is a party to the arbitration agreement (Caron & Caplan, 2013, p. 139).

Contrarily, under HKIAC Rules 2008 (Connor & Talib, 2014, p. 191), LCIA Rules (Choi, 2019, p. 44; Smith, 2018, p. 181; Carrión, 2015, p. 486), ICC Rules (Voser, 2011, p. 793; Smith, 2018, p. 178; Choi, 2019, p. 51; Grierson & van Hooff, 2012, p. 97, fn. 299; Secomb, 2017, p. 331), SIAC Rules 2010 and SIAC Rules 2013 (Carrión, 2015, p. 488), and CIETAC Rules 2015 (Choi, 2019, p. 46), the third party cannot file the joinder request. Under ICC Rules 2012 and 2017, a third party cannot request joinder even if it is a party to the underlying arbitration agreement (Choi, 2019, p. 51).

Further, some arbitration rules have paid more attention to the third parties themselves. Vienna Rules give a definition of the third party in Article 6(1) (4) – “one or more third parties who are neither a claimant nor respondent in the pending arbitration and whose joinder to this arbitration has been requested”⁹. Art. 3 (5) HKIAC Rules 2013 states that “additional party” implies one or more entities¹⁰. Under each set of selected arbitration rules, the joinder of more than one entity is permitted.

UNCITRAL Rules necessitate that the third person has to be a party to the existing arbitration agreement, which is the basis of the arbitration proceedings (Born, 2021, p. 2795). The specific terminology (“third persons”, not “third parties”) was deliberately used, emphasizing this condition¹¹. Hence, joinder under UNCITRAL Rules is not anticipated for multi-contract situations (Caron & Caplan, 2013, p. 56; Born, 2021, p. 2795) (it would be on the parties to specifically agree, in their arbitration agreements, on the possible joinder – “although Article 17(5) of the UNCITRAL Rules does not authorize joinder or intervention in these circumstances, it also does not preclude it” (Born, 2021, p. 2795)).

Other arbitration rules do not require that the third party has to be a party to the underlying arbitration agreement. For example, commentators have specifically noted that LCIA Rules do not impose such a condition (Turner & Mohtashami, 2009, p. 149; Carrión, 2015, p. 487). Interestingly, in the case *CJD v. CJE and another*¹² (the governing rules were LCIA Rules 2014), the Singapore High Court found that the third person, being a party to the arbitration agreement, did not automatically consent in writing to the joinder and has denied the joinder request, even though the third party was already a party to the underlying arbitration agreement. This ruling has been addressed in theory by commentators, stating that “the decision of the Singapore High Court reflects a correct understanding of the importance of party autonomy in arbitration” (Ross & Asschenfeldt, 2022, p. 705).

In addition, SIAC Rules 2016¹³ (Hanotiau, 2020, p. 331) (exception when all the parties agree to the joinder), HKIAC Rules 2013¹⁴ and HKIAC Rules 2018¹⁵

⁹ Art. 6 (1) (4) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

¹⁰ Art. 3 (5) HKIAC Rules 2013.

¹¹ UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008), A/CN.9/665, 30 September 2008, para 129.

¹² *CJD v. CJE and another*, 2021, SGHC 61, High Court, Singapore, paras. 46–64.

¹³ Rule 7 (1) and 7 (8) SIAC Rules 2016.

¹⁴ Art. 27 (1) HKIAC Rules 2013; Art. 27 (8) HKIAC Rules 2013.

¹⁵ Art. 27 (1) HKIAC Rules 2018.

(exception when all the parties agree to the joinder) and CIETAC Rules 2015¹⁶ require that the third party is *prima facie* bound by the arbitration agreement. Under ICC Rules 2021, the *prima facie* test is one of the relevant circumstances the tribunal should take into account when making a decision¹⁷. Other rules do not have such a requirement.

Finally, Swiss Rules and Vienna Rules provide that the third party can participate in different capacities (Habegger, 2012, p. 278; Bärtsch & Petti, 2013, p. 55; Pitkowitz, 2015, pp. 308-309; Baier & Hahnkamper, 2013, p. 142).¹⁸ Other rules provide that the third party can only be joined in full capacity (Boog & Raneda, 2016, p. 589; Mangan & Lingard, 2018, p. 115, par. 7.22; Turner & Mohtashami, 2009, p. 150; Moser & Bao, 2017, p. 221, para. 10.65). Additionally, the commentators of the LCIA Rules specifically note that the joined party, as it became “a full party to the proceedings” (Turner & Mohtashami, 2009, p. 150), would have the right to join the fourth party (Turner & Mohtashami, 2009, p. 150).

The author is of the opinion that both the parties to the arbitration as well as the third party should be given the opportunity to request the joinder. There are many (legitimate) reasons why the parties would prefer to join additional parties or to be joined in the proceedings, and the parties should be able to act upon them. The author criticizes the solution adopted under ICC Rules 2012 and ICC Rules 2017, which prohibits third parties from requesting joinder, even if they are a party to the underlying arbitration agreement on which basis the arbitration has been initiated.

5. When Can the Joinder Be Requested and Who Can Decide on the Matter?

Coming back to the imaginary scenario, the (newly invited) guest(s) should still be invited in a timely manner. It would be unfair not to leave enough time for the guests to prepare for the evening. Besides, they are expected to arrive on time to participate in the planned activities during the gathering. Security would not let the invitees in if it is already late at night, and their presence would hinder others. Is there a time limit for sending new invitations? Would the newcomers be treated differently than other guests?

The parties’ ability to influence the constitution of the arbitral tribunal by appointing the arbitrators is considered to be one of the main advantages of

¹⁶ Art. 18 (1) CIETAC Rules 2015.

¹⁷ Art. 7 (5) ICC Rules 2021.

¹⁸ Art. 14 (2) (3) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021; Art. 6 (4) Swiss Rules 2021.

arbitration (Lew, Mistelis & Kröll, 2003, pp. 223, 382, paras. 10-11, 16-18). However, in situations where more than two parties are involved, the constitution of the arbitral tribunal may raise some difficulties (Born, 2021, p. 2764). Enabling each of the parties to appoint an arbitrator would not be possible, and making the parties “choose the side” with others would not be fair (Lew, Mistelis & Kröll, 2003, p. 380, paras. 16-12). The equal treatment of the parties is “a vital aspect of a fair adjudicative process and must be regarded as an essential element of the opportunity to be heard” (Born, 2021, p. 3840).

The importance of the equal treatment of the parties in the constitution of the arbitral tribunal has been clearly demonstrated in *Dutco Case*¹⁹. In *Dutco Case*, the claimant appointed one arbitrator, the two respondents jointly appointed the second arbitrator, and the presiding was appointed by the ICC Court. Later, however, The Court of Cassation briefly found that “the principle of equality of the parties in the appointment of arbitrators is of public order; that it cannot be waived until after the dispute has arisen” (*Dutco Case*, para. 4)²⁰ and annulled the Court of Appeal’s decision (*Dutco Case*, para. 9)²¹. With the more recent revisions, the institutional rules have incorporated particular provisions to navigate the composition of the tribunal in multiparty scenarios.²²

The question of equal treatment of the parties and the parties’ ability to appoint an arbitrator is intertwined with the question of the timing of the joinder request and the competent body to decide on such a request. Here, the arbitration rules provide for three possibilities.

Firstly, UNCITRAL Rules and LCIA Rules give discretion only to the arbitral tribunal, and at the same time, these rules stipulate that the joinder can solely be requested after the constitution of the tribunal (Choi, 2019, p. 53). As UNCITRAL Rules are, in general, “primarily designed for ad hoc arbitration proceedings” (Choi, 2019, p. 53), there exists no other “decision-making body for joinder requests” (Choi, 2019, p. 53). Under LCIA Rules, the discretion to decide on the

¹⁹ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726).

²⁰ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726, para 4).

²¹ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No. 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726, para 9).

²² See Art. 29 CIETAC Rules 2015; Art. 8 (2) HKIAC Rules 2018; Art. 12 SIAC Rules 2016; Art. 18 Vienna Rules 2021; Art. 11 (3) (4) (5) Swiss Rules 2021; Art. 8 LCIA Rules 2020; Art. 12 (6) (7) (8) ICC Rules 2021; Art. 10 UNCITRAL Rules.

joinder request is considered to be an additional power of the tribunal, and thus, the decision can only be made after its constitution (Darwazeh & Johnson 2019, p. 89; Scherer, 2021, p. 313).

Both of these sets of rules deprive the third party of their chance to appoint the arbitrator (Turner & Mohtashami, 2009, p. 150; Choi, 2019, pp. 44, 53; Scherer, 2021, p. 313). The commentators of LCIA Rules state that “any successful application for joinder under the LCIA Rules will always have to include the third party’s waiver of its right to equal participation in the appointment process” (Choi, 2019, p. 46, see also Scherer, 2021, p. 313). However, both sets of rules permit the third party “to state its views on the prospective joinder” (Paulsson & Petrochilos, 2017, p. 141; Turner & Mohtashami, 2009, p. 148)²³, if the tribunal finds that any party, or the third person who had not participated in the constitution of the arbitral tribunal, would suffer prejudice by the joinder (Caron & Caplan, 2013, p. 56), the joinder would not be allowed²⁴.

Moreover, ICC Rules give discretion to the arbitral tribunal – the joinder can be requested either before or after the constitution of the tribunal. Under ICC Rules 2012 and ICC Rules 2017, joinder after the constitution of the tribunal would only be possible if all the parties agree (Smith, 2018, p. 190; Choi, 2019, p. 52; Darwazeh & Johnson, 2019, p. 89; Meier, 2018, p. 2517; Grierson & van Hooff, 2012, p. 97; Carrión, 2015, p. 499; Meier, 2018a, p. 2214). The consent of the third party is considered “as its contemporaneous waiver of the right to participate in constituting the tribunal” (Choi, 2019, p. 52; see also Carrión, 2015, p. 499). However, Art. 7(5) of ICC Rules 2021 “marks a shift” (Vega-Gonzalez & Gonzalez, 2020), omitting the requirement of the necessary agreement between the parties to join the third party after the constitution of the tribunal, depriving the parties of a possible veto (Vega-Gonzalez & Gonzalez, 2020; Đorđević, 2021, p. 420).

Secondly, under Vienna Rules, SIAC Rules 2016, and HKIAC Rules, the request can be submitted either before or after the appointment of the arbitrator(s). If the joinder has been requested before the constitution of the tribunal, the institution itself can permit the joinder²⁵ (Schwarz & Konrad, 2014, p. 803; Ali et al., 2019, p. 629). According to Rule 7 (6) SIAC Rules 2016, the institution has the right to “revoke the appointment of any arbitrators appointed prior to the decision on joinder”²⁶ (Schwarz & Konrad, 2013, p. 803; Oberhammer & Koller, 2014,

²³ See Art. 17 (5) UNCITRAL Rules and Art. 22 LCIA Rules.

²⁴ Art. 17 (5) UNCITRAL Rules.

²⁵ Rule 7 (4) SIAC Rules 2016; Art. 27 (8) and (9) HKIAC Rules.

²⁶ Rule 7 (6) SIAC Rules 2016. See also Art. 27 (11) HKIAC Rules 2013, Art. 14 (3) (3) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

p. 79; Baier & Hahnkamper, 2013, p. 142). Nevertheless, the decision of the institution is without prejudice to the tribunal's power to rule on its jurisdiction.²⁷

It is worth pointing out some differences. Under SIAC Rules and HKIAC Rules, if the joinder was approved before the confirmation of the tribunal, the parties would be deemed to waive their right to designate an arbitrator.²⁸ Under Vienna Rules, the third party may participate in the constitution of the tribunal²⁹; however, if one has already been constituted and the third party has not waived its right to appoint an arbitrator, the statement of claim must be returned to the Secretariat and shall be dealt with in separate proceedings³⁰ (Pitkowitz, 2015, pp. 311-312). Additionally, it seems that the party which requests the joinder can have "two bites at the cherry" (Boltenko & Lua, 2016) under SIAC Rules, as the SIAC Court's refusal of such request does not preclude the party to submit it again when the tribunal has been appointed (Boltenko & Lua, 2016; Boog & Raneda, 2016, p. 588; Choong, Mangan & Lingard, 2018, p. 120, para. 7.49; Dulac & Lo, 2016, p. 131; Smith, 2018, p. 184).

On the other hand, under Swiss Rules, the request can be submitted either before or after the constitution of the tribunal (Zuberbühler, Müller & Habegger, 2022, p. 86). The tribunal has discretion to decide on the joinder request; however, there is a difference in treatment if the request for joinder has been made after the constitution of the arbitral tribunal. If the third person is requesting to intervene, it is deemed the third person has accepted the constituted arbitral tribunal; however, if the original party is requesting the joinder, the third person must accept the constituted arbitral tribunal – if not, the joinder should not be allowed (Bärtsch & Petti, 2013, p. 66; Zuberbühler, Müller & Habegger, 2022, p. 91).

Finally, CIETAC Rules 2015 are the rules that allow the request for joinder to be made at any stage of the proceedings, but only the institution has the discretion to decide. The institution has been granted "the extraordinary power to make the final call for joinder requests" (Choi, 2018, p. 46), and the tribunal is only assisting (Choi, 2018, p. 46). The third party can "remove the already constituted tribunal when the joinder takes place after its formation and if it decides to exercise its right to nominate an arbitrator" (Choi, 2018, p. 46). The additional party may request that the proceedings start over, "so that it has a fair opportunity to present its case" (Sun & Willems, 2015, p. 176). However, to avoid prolonging and further complicating the proceedings, CIETAC may deny the request if it finds the joinder unsuitable (Peter, 2021, pp. 53-54; Hanotiau, 2020, p. 331).

²⁷ Rule 7 (4) SIAC Rules 2016; Art. 27 (8) HKIAC Rules.

²⁸ Rule 7 (12) SIAC Rules 2016; Art. 27 (11) HKIAC Rules.

²⁹ Art. 14 (3) (2) Vienna Rules.

³⁰ Art. 14 (3) (3) Vienna Rules.

The author understands the importance of equal treatment of the parties in international arbitration; however, the author believes that allowing third parties to have a major influence on the proceedings (and even demand that the proceedings start from the beginning, as in CIETAC Rules) is not completely justified, as third parties can abuse such opportunity and further prolong the proceedings. In situations where the third party is not deemed to have waived its right to appoint the arbitrator (the situations where the third party can request the joinder), the author proposes the following solution: if the parties cannot reach an agreement regarding the appointment of the arbitrators, the arbitral tribunal shall be appointed by the institution. This solution is only applicable to institutional rules.

6. Who Has to Agree to the Joinder?

Coming to “the grand finale of the evening” with the burning question: do both hosts have to agree on the newly invited guest(s)? What if the invitee does not want to come to the gathering? Is it possible that the person has accepted the invitation earlier, but now has changed its mind?

The arbitral tribunals “derive their powers from a private agreement (the arbitration agreement) and not from the authority of a state” (Girsberger & Voser, 2016, p. 141). Thus, consent is the cornerstone of arbitration. According to the unanimous view in the doctrine, the joinder of third parties is not permissible without consent (Born, 2021, p. 2762; Blackaby et al., 2015, p. 91, par. 2.59). However, there are differing opinions when the question of consent is raised – specifically, in which way can consent be given and which parties have to consent to the joinder. The arbitration rules have differently regulated the matter.

For example, LCIA Rules, HKIAC Rules 2008, SIAC Rules 2010, and SIAC Rules 2013 require written consent, while SIAC Rules 2007 require express consent. LCIA Rules 2020 require consent “expressly in writing”. HKIAC Rules 2018 require the parties’ express consent if the third party is not a party to the arbitration agreement on which the proceedings are based (Born, 2021, p. 2802).³¹

When it comes to the parties which have to consent, LCIA Rules and HKIAC Rules 2008 necessitate only the written consent of the requesting party and the third party³² (Bao, 2014; Moser & Bao, 2017, p. 209, para. 10.12). It is worth noting that LCIA Rules 2020 “only require the consent of one of the disputants and the third party, and thus allow for joinder despite the objection of one of the parties” (Scherer & Jensen, 2023, p. 208).

³¹ Art. 27 (1) HKIAC Rules 2018.

³² Art. 22 LCIA Rules; Art. 14 (6) HKIAC Rules 2008.

Similarly, under UNCITRAL Rules, the consent of the other party is not needed since “a non-requesting party to the arbitration is deemed to have consented to any request to join a third person who is also a party to the arbitration agreement” (Caron & Caplan, 2013, p. 55). The third person has to already be a party to the existing arbitration agreement, which is the basis of the arbitration proceedings (Born, 2021, p. 2795). Thus, UNCITRAL Rules are “more restrictive in scope” (Caron & Caplan, 2013, p. 55) compared to LCIA Rules.

However, the most disputed way of giving consent to the joinder is simply by agreeing to the arbitration rules (Lew, Mistelis & Kröll, 2003, p. 390, para. 16-42; Born, 2021, p. 2766). Specifically, this question is raised when it comes to LCIA Rules and Swiss Rules. On the one hand, some authors state that the parties have already given their consent by agreeing to arbitrate under these sets of rules (Turner & Mohtashami, 2009, p. 149; Lew, Mistelis & Kröll, 2003, p. 390, para. 16-44; Waincymer, 2012, pp. 566-567; Born, 2014, p. 2601; Kim & Mitchenson, 2013, p. 413; Gerbay, 2013, p. 70; Park, 2007, p. 130, fn. 380; Carrión, 2015, pp. 487, 497; Choi, 2019, p. 44; Scherer, 2021, pp. 311-312; Born, 2021, p. 2801; Loh, 2014, p. 77; Hanotiau, 2020, p. 333; Schramm, 2018, p. 491; Scherer & Jensen, 2023, p. 218). On the other hand, some commentators advocate for a more strict approach and insist that anticipatory consent is not enough (Voser, 2009, p. 397; Habegger, 2012, p. 280; Bärtsch & Petti, 2013, p. 64; Meier, 2018, p. 2517; Girsberger & Voser, 2016, p. 141). Finally, commentators have addressed the ambiguity of the Swiss Rules by stating that “the former Art. 4(2) of the 2012 Swiss Rules could not, in our view, be a substitute for the consent of the parties to the arbitration or the third person. The same is true for Art. 6, and this has now been clarified...” (Zuberbühler, Müller & Habegger, 2022, p. 79) and “just like Art. 4(2) of the 2012 Swiss Rules, Art. 6 does not create a standalone jurisdictional basis over the third person or persons to be joined” (Zuberbühler, Müller & Habegger, 2022, p. 80).

When it comes to the stand of the arbitral tribunal, this issue has not been sufficiently addressed (Born, 2021, p. 2800). Nevertheless, an important decision has been rendered in *Astro Case*³³. Even though the governing rules were the SIAC Rules 2007, the court thoroughly addressed the nature of forced joinders under the LCIA Rules and Swiss Rules as well. In the *Astro* case, the Singapore Court of Appeal asserted that “a joinder under the LCIA Rules and the Swiss Rules has, rather aptly, been termed a ‘forced joinder,’ since a joinder under these rules is possible notwithstanding the objections of a party to the arbitration” (*Astro case*, para. 176). Furthermore, the Court addressed the question of consent through the subscription to the institutional rules that provide for the possibility of a joinder, affirming

³³ *PT First Media TBK v Astro Nusantara International BV*, 2013, SGCA 57, Court of Appeal, Singapore.

that “if there is consent given in any form, either under the arbitration agreement or through subscription to a set of institutional rules that unambiguously permits forced joinders, that would suffice to negate any subsequent allegation that there was no agreement to arbitrate with the joined party” (*Astro case*, para. 177). However, “at a more general level, in the face of linguistic ambiguity in the provision that regulates the power to join without obtaining further consent, the consent under an arbitration agreement to arbitrate in accordance with a set of institutional rules cannot be taken as *ex ante* consent to the forced joinder” (*Astro case*, para. 197).

The Court held that “the idea of forced joinders is a drastic one” (*Astro case*, para. 197) and represents “also a major derogation from the principle of party autonomy ... by compelling an arbitration with other persons with whom the parties had not specifically agreed to arbitrate” (*Astro case*, para. 188). Additionally, the Court insisted that “a rule which allows the tribunal to order a forced joinder without obtaining ‘fresh’ consent to the joinder must be decidedly unambiguous” (*Astro case*, para. 197).

The author sides with the commentators stating that the acceptance of the arbitration rules that provide the possibility for a joinder can imply consent to the joinder. Given the fact that there is a significant difference among the institutional rules as to the form and the degree of the required consent, the parties can choose the more restrictive set of arbitration rules.

7. Conclusion

The arbitral tribunals, when making a decision on a joinder request, are faced with immeasurably more complicated tasks than those organizing a private gathering. The tribunal has to pay special attention to every detail, since the fundamental principles of the international arbitration are at risk – with just one misstep the award could be unenforceable.

LCIA Rules and SIAC Rules are the rules that have paved the way for other arbitration institutions to incorporate and specifically regulate the joinder mechanism. As the pioneers in the matter, LCIA Rules and SIAC Rules imposed the model which has been used as the inspiration for the drafters in the beginning stages. Certainly, each institution would add a few unique components. As a consequence, the variety of the joinder provisions from which the parties can choose exists and parties can opt for the most suitable one. The key similarities and differences between the arbitration rules can be pointed out, however the main issues of the joinder mechanism remain the consent of the parties and the equal treatment of the parties in the constitution of the arbitral tribunal.

The author has attempted to metaphorically simplify the aspects of the joinder and the difficulties which arise with the additional parties. The direction which the development of the arbitration rules will take and whether there will be some new questions for the organizers to consider when planning the events and inviting the guests, remains to be seen.

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CONSTITUTIONALIZATION OF THE JUDICIAL COUNCIL IN NORTH MACEDONIA AND SERBIA – CAN WE LEARN FROM EACH OTHER?

Summary

North Macedonia and Serbia constitutionalized their judicial councils around the same time. From the perspective of the European model of the judicial council, North Macedonia adhered more closely in implementing their sample model, whilst Serbia foresaw constitutional provisions which had not eliminated the channels of political influence over the judiciary. It was clear, immediately following the adoption of the 2006 Constitution, that Serbia had to amend it if it wished to tie its future to the European integration process. Although that process did not unravel quickly and easily, the constitutional amendments which constitute the improved model of the Judicial Council were adopted in 2022. What is characteristic for modelling of the new Judicial Council is the fact that the amendments were based exclusively on the abstract criticisms of the constitutional provisions from 2006 and the recommendations of the Venice Commission that are necessary to adhere to the European model of the Judicial Council. It is paradoxical that the European model of the judicial council is considered the best solution for post-socialist states, without consideration for concrete socio-economic circumstances in individual states, nor the suppositions for successful functioning of this body. After all, neither the concept of the judicial council has been accepted in all member states of Western Europe, nor all post-socialist states have implemented their institutional reforms in that direction. Some of those states had decided to follow their own, authentic road to the independence of the judiciary. This leads to the question: why the

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European institutions are insisting on the reform of the judiciary that involves the establishment of a pure variation of the so-called European model of the judicial council when it is not a generally accepted model? Furthermore, it is questionable as to whether it has a universal value. Precisely for that reason, the goal of this paper is to present the specific nature of judicial councils in North Macedonia and Serbia. In light of the 2022 constitutional reform in Serbia, an analysis of the extent these two countries could utilize each other's experiences, seeing as they have a mutual historical heritage and similar level of development of their democratic and legal culture, could be an enlightening one.

Keywords: judge, judicial independence, judicial council, constitution, Venice Commission.

KONSTITUCIONALIZOVANJE PRAVOSUDNOG SAVETA U SEVERNOJ MAKEDONIJI I SRBIJI – MOŽEMO LI UČITI JEDNI OD DRUGIH?

Sažetak

Severna Makedonija i Srbija, približno u isto vreme, konstitucionalizovale su pravosudne savete. Sagledano iz perspektive evropskog modela pravosudnog saveta, Severna Makedonija se više približila tom uzornom modelu, dok je Srbija predvidela ustavna rešenja koja nisu eliminisala kanale za politički uticaj na pravosuđe. Otuda, odmah posle donošenja Ustava 2006. godine, bilo je jasno da će Srbija morati da promeni svoj ustav u delu o pravosuđu ukoliko svoju budućnost želi da veže za evropske integracione procese. Premda se taj proces nije odvijao brzo i jednostavno, ustavni amandmani koji konstituišu unapređeni model Visokog saveta sudstva usvojeni su 2022. godine. Međutim, ono što je karakteristično za ustavno modeliranje novog Visokog saveta sudstva, jeste činjenica da je promenu Ustava u delu o pravosuđu Srbija zasnovala isključivo na apstraktnoj kritici ustavnih rešenja iz 2006. godine i na preporukama Venecijanske komisije da je neophodno dosledno koncipirati evropski model sudskog saveta. Bez obzira na to što se Ustav primenjivao približno petnaest godina, nije bilo analize koja bi trebala da utvrdi ocenu rada Visokog saveta sudstva. Da je rad tog tela, kojim slučajem, ocenjen negativno, onda je trebalo da sledeći korak bude identifikovanje razloga za taj neuspeh. Osim

toga, budući da je Severna Makedonija takođe imala već značajno iskustvo sa sudskim savetom koji je bio više usaglašen sa evropskim standardima, rezultati koje je to telo ostvarilo u praksi mogli su da budu korisni. Dakle, bez obzira na već značajno iskustvo tih dveju država, ali i iskustvo drugih država postsocijalizma, ustavna reforma pravosuđa u Srbiji sprovedena je bez ozbiljnije empirijske analize, već isključivo na osnovu apstraktne ideje da je evropski model sudskog saveta optimalno rešenje i da ga treba nekritički preuzeti.

Ključne reči: sudija, nezavisnost sudstva, pravosudni savet, ustav, Venecijanska komisija.

1. Introduction

Although, comparatively speaking, it has not come close to achieving the expected results in terms of securing the independence of the judiciary, the model of a strong judicial council has become one that the European institutions have promoted with full force. Namely, from the states that are in the process of joining the European Union it is expected that they will establish a judicial council whose main task is to secure the self-governance of the judiciary.¹ Seeing as it ensures a high level of self-governance, this model is naturally supported by the representatives of the judiciary. It also has the full support of scholars and non-governmental agencies. The constitutionalization of a strong judicial council has become a symbol of progress and democratization of a state.

Seeing as the judiciary is in its nature weaker in relation to the political branches of government, the formation of a judicial council should contribute to the maximization of judicial independence, which is central to the idea of rule of law (Castillo-Ortiz, 2017, p. 316). Therefore, in essence, the idea of a Judicial Council is good, because that body should be a defense mechanism from the politicization of the judiciary. The judicial council as an institution is not novel. It originated in France in 1883, with the intent of protecting judges from being removed in instances where it was motivated by political reasons (Bell, 2006, p. 27). Portugal and Spain adopted this solution, however until the end of WW2 there was no significant headway made by these institutions. Following the war, the model was implemented in France from 1946 and Italy from 1948, due to the increasing demand for protecting the judiciary from political influence (Bell, 2006, p. 27).

¹ “The message sent from the European institutions in this respect was quite clear: If you wish to join the ‘Euro club’, you ought to introduce (at least some features of) self-government of the judiciary” (Bobek & Kosař, 2014, p. 1276). See also Kosař & Vineze, 2022.

Despite France being its cradle, Italy achieved better results with the implementation of this institution, hence its Judicial Council became the exemplary model for post-socialist states. Thus, the Italian concept of the judicial council, due to its high efficacy in practice, has become the foundation of the so-called European model of the judicial council.

It is paradoxical that the European model of the judicial council is considered the best solution for post-socialist states, without consideration of concrete socio-economic circumstances in individual states, or suppositions for successful functioning of this body. After all, neither that concept of the judicial council has been accepted in all member states of Western Europe, nor all post-socialist states have implemented their institutional reforms in that direction. Some of those states had decided to follow their own, authentic road to the independence of the judiciary (Czech Republic, Poland). This leads to the question: why the European institutions are insisting on the reform of the judiciary that involves the establishment of a pure variation of the so-called European model of the judicial council when it is not a generally accepted model? Furthermore, it is questionable as to whether it has universal value. As has been commented in theory, the forcing of this model through European institutions “yet again confirms the fact that, as in the business, the product that sells in the end is not necessarily the best one in terms of quality, but the product that has the better marketing” (Bobek & Kosař, 2014, p. 1277). This product was also served to the former Yugoslavian republics, hence Serbia and North Macedonia are not an exception. Precisely for that reason, the goal of this paper is to present the specific nature of the judicial council in these two countries. In light of the constitutional reform of 2022 in Serbia, an analysis of the extent these two countries could utilize each other’s experiences, seeing as they have a mutual historical heritage and similar level of development of their democratic and legal culture, could be an enlightening one.

2. In Search of a Unique “European Model” of the Judicial Council

Seeing as the European institutions promote an exclusive model of court administration, it is logical to assume that all members of the European Union have at least a similar model in that area. However, that is a false assumption. According to Bobek and Kosar, we could discuss five different models of court administration in Europe: (1) The Ministry of Justice model, (2) the Judicial Council model, (3) the courts service model, (4) hybrid models, and (5) the socialist model (2014, pp. 1265-1267). The first model involves a key role of the Ministry of Justice in matters pertaining to the appointment and promotion of judges,

as well as the administration of the judiciary. However, that model in practice does not function in such a way where the Ministry of Justice has full control and arbitrary power in executing its powers. Although nominally, those powers are exercised by the Ministry of Justice in cooperation with the presidents of the courts. Such models exist in Germany, Austria, the Czech Republic, and Finland, among others. The second model is characterized by the existence of an independent body positioned between the judiciary, on the one hand, and political branches of government, on the other. The judicial council has been provided with two groups of powers. The first being those related to the appointment and promotion of judges and/or to exercising disciplinary powers vis-à-vis judges, whilst the other related to the administration of the judiciary and its financing. This group includes the following countries: Belgium, Bulgaria, France, Hungary (until 2011), Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. Worthy of mention is the fact that this category of states is not monolithic, because the judicial council in some of those states do not fulfil the standards of the so-called European model of the judicial council. The third, court service model, is founded on the limited role of an independent body whose primary role lies in the area of administration, court management, and budgeting the courts. On the other hand, contrary to the judicial council model, the court service model has significantly limited powers in terms of the legal status of judges. In addition, there are other bodies that are responsible for the appointment, promotion and disciplinary responsibility of judges. The court service model exists in Denmark, Ireland, Norway and Sweden. The fourth category is made up of hybrid models, which combine characteristics of the previously discussed models. These are specific systems which cannot be generalized, seeing as they are all very different. Hybrid models exist in England and Wales, Estonia, Hungary, Iceland, and Switzerland. Finally, the socialist model, which no longer exists in its pure form in Europe, involved the implementation of full control of courts and judges by the communist party.

Although this is only one of the possible classifications of the European model of court administration, it is a sufficiently illustrative one to show the general differences between the European states in that area. Aside from that, the states which are classified within the framework of the same model do not have an entirely same solution. For example, when discussing the states that are implementing the judicial council model, the judicial councils differ in the way they are formed and regarding the guarantees of independence, as well as the scope of their powers. The mere existence of the judicial council with significant powers in the sphere of court administration does not simultaneously mean that this body fulfills all current European standards which relate to the legal position of that body.

It is illustrative to mention the classification of W. Voermans and P. Aleber who speak, in essence, of the existence of two types of judicial councils in Europe: The Southern European model and the Northern European model (2003, p. 10). The Southern European model is characterized by the judicial council whose primary responsibility is to safeguard the judicial independence which is effectuated by way of the functions of appointment and dismissal of members of the judiciary. That model of judicial council is to be found in France, Italy, Spain and Portugal. The Northern European model involved a judicial council with only certain limited powers with regard to judicial appointments and dismissal and extensive powers in the administration of the judiciary. Sweden, Ireland, and Denmark are examples of countries with this type of the judicial council. This classification is becoming outdated because it significantly simplifies the diversity of solutions in European comparative constitutional law. In addition, that classification, despite recognizing amongst them a qualitative difference, places the Southern European model and the Northern European model on the same plane. Namely, the Northern European model is based on the limited role of the judicial council whose primary role lies in the areas of administration, court management and budgeting the courts. This model of judicial council does not have institutional guarantees, nor does it fulfil standards that are recommended by the European Institutions with respect to the status and function of the judicial council.

From a comparative point of view, there are significant differences in all elements of the legal position of the judicial council. With respect to the number of members, judicial councils can be classified as small (the Netherlands - 5 members), medium (Spain - 20 members), large (Italy - 27 members) and extremely large (Belgium - 44 members) (Simović & Petrov, 2018, p. 292). Certain judicial councils have *ex officio* members (president of the Republic - Italy; minister of justice - in Poland and Romania; President of the Supreme Court - Spain, or court presidents - in Poland, Bulgaria; and state prosecutors - in Italy and Bulgaria) (Simović & Petrov, 2018, p. 292). According to the membership and manner of appointment of the members of the council, four models are possible: 1) the judicial council is exclusively composed of judges who are elected from amongst themselves (such a solution is exceptional and exists in France in accordance with the Law from 1883); 2) a mixed membership with three variances: a) majority judges and minority members who are not judges (Italy, the minority is made up of professors or law and law professionals; Poland - the minority is made up of parliamentarians), b) minority judges (France, in accordance with the Constitution from 1946), c) equal number of members who are judges and members who are not (Belgium, according to the Constitution from 1999); 3) the judicial council members are exclusively judges who are appointed by the parliament (Spain,

according to Organic law from 1985); 4) political composition of the council – members of the council are elected by parliament or appointed by the government (Simović & Petrov, 2018, p. 292).

According to the Venice Commission's view, an independent judicial council is the most appropriate method for guaranteeing the independence of the judiciary by having decisive influence on decisions on the appointment and career of judges. Seeing as there is no single model which applies to all countries, "the Venice Commission recommends that states which have not yet done so, consider the establishment of an independent Judicial Council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers" (Venice Commission, 2010, para. 32).

Finally, it is possible to isolate five key characteristics of the European model of judicial Council from the plethora of documents adopted under the auspices of the European Union and the Council of Europe: 1) A judicial council should have constitutional status; 2) at least 50% of the members of the judicial council must be judges and these judicial members must be selected by their peers; 3) a judicial council ought to be vested with decision making and not merely advisory powers; 4) a judicial council should have substantial competences in all matters concerning the career of a judge; 5) judicial council must be chaired either by the president or chief justice of the highest court or the head of state (Bobek & Kosař, 2014, p. 1263).

3. The European standards and the Judicial Council in North Macedonia

In 2005, North Macedonia was among the first state in the region to initiate the judicial reform by following the assistance and recommendations of the European Union (Preshova, Damjanovski & Nechev, 2017, p. 22; see also Aki-movska Maletić, 2017). At the time, eleven constitutional amendments directed at the judiciary were adopted, whereby emphasis was placed on the creation of a Judicial Council, as an independent institution established in order to ensure the independence of the judiciary (Venice Commission, 2005). However, those constitutional amendments were not sufficient for concluding the process of judicial reform. In fact, it was only the necessary first step, which was to be followed by the process of adopting laws in the sphere of the judiciary. That process has not been concluded to date, which is evident in the Law on the Judicial Council from 2019, aimed at improving the legal position of this body and which confirms that

the search continues for an optimal solution (Venice Commission, 2019). Since adopting the constitutional amendments, North Macedonia has followed the recommendations of the Venice Commission multiple times during the implementation of partial reforms to the judiciary.² In that sense, North Macedonia has fairly consistently aimed at the implementation of European standards, however the question remains as to whether the Judicial Council has effectuated the expected results in practice.

According to the Constitution, the Judicial Council of North Macedonia is an independent and autonomous institution, established in order to ensure and guarantee the independence and the autonomy of the judiciary. From the perspective of comparative law, primarily with respect to the states in the region, it can be concluded that the Judicial Council is a larger body seeing as it has fifteen members. Taking into consideration the total number of judges in North Macedonia, comparatively speaking, that body has one of the largest number of members. Its size can be considered both an advantage and disadvantage. On the one hand, such a large Judicial Council secures a higher degree of legitimacy of that body and allows for dispersion of the way its members are selected. Such a large number of members within the Judicial Council should contribute to a higher level of efficiency, its greater competency, but it should also ensure a balanced membership on multiple basis. On the other hand, a smaller number of members would imply that the bodies who propose and elect them must be much more cautious, because their mistakes will be more prominent. A larger body creates the danger that aside from eminent legal professionals of high moral standards, members may also be elected though their professional life to date is not deserving it. Simultaneously, a smaller membership gives an impression of an exclusive body whose members should be the legal elite of a society. In addition, the smaller the body is, the more significant its members are and, in such circumstances, they have an obligation to act more conscientiously.

² See Venice Commission, CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of “the former Yugoslav Republic of Macedonia” concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones; Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of “the former Yugoslav Republic of Macedonia”; Venice Commission, CDL-AD(2017)033, Opinion on the Draft Law on the termination of the validity of the Law on the Council for establishment of facts and initiation of proceedings for determination of accountability for judges, on the Draft Law amending the Law on the Judicial Council, and on the Draft Law amending the Law on Witness protection; Venice Commission, CDL-AD(2018)022, Opinion on the Laws amending the Law on the Judicial Council and the Law on Courts of “the former Yugoslav Republic of Macedonia”; Venice Commission, CDL-AD(2018)033, Opinion on the draft amendments to the Law on Courts of “the former Yugoslav Republic of Macedonia”.

The Judicial Council is made up of two categories of members, elected and *ex officio* members. Aside from the President of the Supreme Court of North Macedonia and the Justice Minister who are *ex officio* members of the Judicial Council, this body consists of eight more judges and five eminent legal professionals. Member judges are elected by judges. Three of them shall belong to the communities that are not majority in the North Macedonia, ensuring that equitable representation of citizens belonging to all communities shall be observed. The other five members are not elected in the same manner. Three members of the Council are elected by the Assembly of North Macedonia with majority votes of the total number of MPs, and with majority votes from the total number of MPs who belong to the communities that are not majority in North Macedonia. Two members of the Council are proposed by the President of the Republic of North Macedonia and are elected by the Assembly of North Macedonia, and one of them shall belong to the communities that are not majority in North Macedonia. The members of the Council elected by the Assembly of North Macedonia, on a proposal of the President of the Republic of North Macedonia, shall be from among university law professors, lawyers and other prominent jurists.

A diversified procedure for forming a Judicial Council should secure a balanced membership on multiple basis. The various criteria which should be taken into consideration should decrease the possibility of politization of the selection of members for the Judicial Council. That is in essence a positive aspect of this complex way of forming such an institution. However, the option that the Minister of Justice is foreseen to be a member of the Judicial Council can be criticized. Even though the majority of members of the Judicial Council are judges, the Minister of Justice with his authority and influence on other members of the council can be a channel of politization of the work of that body. In order to minimize this possibility, the Law on the Judicial Council prescribes that *ex officio* members of the Council participate in the work of the Council without voting rights, whereas they do not at all participate in the meetings in which discussions and decisions are taking place regarding the selection, dismissal and disciplinary accountability of the judges.

The members of the Council are elected for a term of six years, with the right to one re-election. On the one hand, a mandate of six years should secure a higher degree of independence of the members of the Council from the parliamentary majority. On the other hand, the possibility of re-election can be considered a bad solution, because there is a concern that in that way the elected members of the Council, with their cooperation, shall strive to secure another mandate. This concern is especially justified in the group of younger members, who have a long period of time following the conclusion of their mandate until their old age pension begins.

The office of a member of the Council is incompatible with membership in political parties, however, seeing as that disallowance is relatively easy to get around by resigning from the political party, the Law on the Judicial Council also prescribes that a member of this body also cannot have been a member of parliament, member of Government, or held function within a political party in the last four years. In this way, the law narrows down the possibility of this body being politicized.

The legal position of the Judicial Council not only prescribes the manner in which it is formed but also the scope of its competencies. Even in that aspect North Macedonia has followed the European standards. The Judicial Council is a body which possesses powers which are necessary to secure the independence of the judiciary. Namely, Judicial Council has extensive powers related to judicial appointments, promotions and dismissals, as well as in determining disciplinary responsibility of judges.

Considering the analysis thus far, it can be concluded that North Macedonia has followed the recommendations and standards of the EU in establishing the institutional framework of the Judicial Council. After all, that was also confirmed by the Venice Commission whence adopting the constitutional amendments: “The proposed reform is to be welcomed as providing for a depolitisation of the appointment and removal of the Judiciary. In particular, the presence of a judicial majority on the Council is to be welcomed as are the provisions concerning representatives of the non-majority communities” (Venice Commission, 2005, para. 40). However, regardless of the fact that North Macedonia has followed the European standards fairly consistently, it has become clear that for achieving the judicial independence is not enough to change the Constitution and laws. As some of North Macedonian authors have concluded: “it is rather evident that the judiciary was not ready for the high level of self-government”, and that the “judicial independence could not be imposed without a proper awareness among judges and their will to obtain it” (Preshova, Damjanovski & Nechev, 2017, p. 22). As an illustration of the assertion that the Judicial Council is under strong political control in North Macedonia, we look at the so-called wiretapping scandal from 2015, when it became evident that there is „an extensive informal mechanism of governmental and party control over the processes of recruitment, promotion and dismissal of judges, as well as governmental influence over high profile court verdicts” (Preshova, Damjanovski & Nechev, 2017, p. 22). Therefore, regardless of the fact that the European model of the judicial council has been implemented over the course of ten years, this body has not significantly contributed to the improvement of the independence of the judiciary. Accordingly, the experiences of North Macedonia bear witness to the fact that adopting the European model of

the judicial council is not a sufficient guarantee that the politization of the court could be prevented. The difference is that that body makes the political influence less evident, which is simultaneously the negative aspect to the existence of the judicial council.

4. Constitutional Reform of the Judicial Council in Serbia

Serbia adopted its second, post-socialist Constitution in 2006, which was just after the constitutional reform of the judiciary had taken place in North Macedonia. Seeing that the 1990 Constitution of Serbia did not foresee any form of judicial council, the constitutionalization of the High Judicial Council in the new Constitution was its attempt to adhere to the European standard. The High Judicial Council has been constituted as an independent and autonomous body which guarantees independence and autonomy of courts and judges. However, serious objections could be directed to the manner in which the High Judicial Council has been constituted, as well as the scope of its powers.

The High Judicial Council had 11 members and that number could be considered as an appropriate one. Its members were the President of the Supreme Court of Cassation, the Minister of Justice, and the President of the competent committee of the National Assembly, in addition to *ex officio* members and eight elected members elected by the National Assembly. The elected members were six judges with a permanent judicial role, and two eminent and prominent jurists with at least 15 years of experience in the field, one of which was a lawyer and the other a professor of law. The mandate for the members of the High Judicial Council is five years, except for the *ex officio* members. However, some procedures pertaining to the formation of the High Judicial Council were controversial. First, the quality of the constitutional guarantee of the independence of this body could be questioned because the formation of this Council, directly or indirectly depends on the political will of the parliamentary majority. Eight of the elected members of the Council are selected by the National Assembly, and its influence significantly stretches across three members within their functions: the Minister, selected by the Parliament, the President of the competent committee of the National Assembly, who is at the same time a Member of Parliament, and the President of the Supreme Court of Cassation, who is also elected by National Assembly. Therefore, the parliamentary majority dominates over this body, hence there could not be an independent judicial council. In addition, there is the European standard regarding the need to establish a guarantee that the Judicial Council must have member judge representatives from all levels and types of courts.

Furthermore, the number of eminent jurists that are elected by Parliament can also be criticized. Also, amongst eminent jurists, advantage has been given to the lawyers. Undoubtedly, the election of eminent jurists should not have been limited only to the legal professions, which included professors and lawyers.

Taking into consideration the definition that the High Judicial Council guarantees independence and autonomy of courts and judges, it can be stated that the competencies of this body has not be adequately defined. The competence of electing judges has been divided between the High Judicial Council and the National Assembly. The Constitution of Serbia has prescribed two categories of judges that are elected in different ways. First, at the proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time. Tenure of office of a judge elected to the post of judge shall last three years. The High Judicial Council shall elect judges to the posts of permanent judges, in that or in other court. This can lead to the conclusion that this process allows for political influence during the election of judges, because the initial election of each judge is based on the decision of the parliamentary majority.

Domestic scholars, as well as the Venice Commission, have recognized a series of weaknesses in the Constitution that related to the judiciary. Those weaknesses have raised questions regarding the possibility of achieving the independence of the judiciary as one of the fundamental principles of the rule of law. The major flaw pertains to the potential politization of the judiciary due to significant competences of the Parliament. The Venice Commission has expressed particular disapproval of the fact that the Parliament plays two roles in the process of judge selection; specifically, as the body that selects the members of the High Judicial Council and the one that elects judges for their first tenure. The need to amend the Constitution was identified by the state itself back in 2013, within the scope of the National Strategy of Reform of the Judiciary, for the purpose of strengthening the independence of the judiciary by eliminating the influence of the legislative and executive powers on the process of election and dismissal of judges and presidents of the courts, as well as the elected members of the Judicial Council. However, the process of amending the constitution is not that quick. Constitutional amendments were only adopted at the referendum which took place in January 2022. Their preparation took place with the active and open consultation of the Venice Commission, which supported the constitutional reform of the judiciary. At first glance, in essence, the constitutional amendments pertaining to the judiciary were improved. The probationary tenure of judges was eliminated, whilst the manner of formation and the function of the High Judicial Council were significantly improved and advanced.³

³ About High Prosecutorial Council see Orlović & Rajić, 2023, pp. 150-156.

The High Judicial Council shall have 11 members, however its membership has been significantly changed. It is now to include: six judges elected by the judges, president of the Supreme Court and four prominent lawyers elected by the National Assembly. The National Assembly shall elect members of the High Judicial Council among prominent lawyers with at least 10 years of experience in legal practice, among eight candidates proposed by the competent committee of the National Assembly, after having conducted public competition, by a two-thirds majority vote of all deputies. If the National Assembly does not elect all the four members within deadline stipulated by the law, the remaining members upon the expiry of the deadline shall be elected from among the candidates who meet the criteria for election, by a commission composed of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor, and the Ombudsman, by majority vote.

The mandate of the High Judicial Council has also been broadened. The body shall elect judges and decide on the cessation of their tenure, elect the president of the Supreme Court and presidents of other courts and decide on their dismissal, decide on the transfer and temporary relocation of judges, determine the necessary number of judges, and decide on other issues related to the status of judges. Therefore, the High Judicial Council has gained powers that enable the protection of the independence of judges and courts. With respect to the members of the High Judicial Council, the European standard has been accepted whereby the majority of them are judges, and the Minister of Justice and President of the competent committee of the National Assembly are no longer members of the Council. In order to secure the most objective and depoliticized election, it is foreseen that eminent jurists will be elected by way of a two third majority vote in parliament, which means a broad consensus during their election. It is clear that observable channels of possible politization of the judiciary have been eliminated, however new channels for their covert existence have been created instead.

Regardless of the fact that eminent jurists are selected by way of a two-third majority vote in the Parliament, the competent committee of the Parliament has been given a key role in that election process. Namely, following the public competition process, the competent committee of the National Assembly completes a preliminary election process by proposing eight candidates from those nominated. Specifically, it's a triage of candidates which can gain the character of political filter. Seeing as the parliamentary majority as a rule dominates in the most important parliamentary committees, it is clear that will be a channel of strong political influence. In that way, the competent parliamentary committee has the opportunity to eliminate candidates who are not favorable to the parliamentary majority and to prejudice their final selection. That preliminary election

may result in the creation of a list of bad and unacceptable candidates, whereby the election of eminent jurists would transfer to a special body which would be formed for that purpose. Therefore, although the basic idea for the election of jurists is founded on a broader agreement and the votes of oppositional political parties so as to achieve a two-third majority of members of parliament, a decisive role is played by the parliamentary majority by way of representation of its members in the competent parliamentary committee.

Following the triage of candidates which takes place within the competent parliamentary committee, in the second phase National Assembly elects four eminent jurists from the eight proposed candidates by way of a two-third vote. However, the Constitution does not define the time period within which the election of eminent jurists must take place, as that issue must be regulated by law. In that way, seeing as there is an alternative method for electing eminent jurists, one of the important questions regarding the procedure for their election has been left up to the parliamentary majority. Hence, the law can prescribe, on the one hand, an inappropriately long period of time or an extremely short one, on the other, for the election of eminent jurists. In the first case, if an inappropriate period of time is prescribed for concluding the election process, the parliamentary majority can tentatively obstruct the election of eminent jurists and drag out the fulfillment of the membership of the High Judicial Council and in that way block its future work. In the second case, if the period of time is too short to conclude the election of eminent jurists, it may hinder the achievement of compromise and the formation of a two-third majority necessary for the election of eminent jurists and thus displace their election outside the Parliament. Therefore, seeing as there is an alternative method to their election, the period of time during which the National Assembly should elect eminent jurists is an important element of those proceedings and it should undoubtedly be defined by the Constitution.

The election of eminent jurists by a two-third majority should contribute to the election of the best candidates, however, looking at the constitutional provisions as a whole and the political reality the prescribed process is erroneous due to multiple reasons. If we disregard the current political circumstances and absolute dominance of one political party, the Serbian political scene is characterized by high fragmentation and instability. Hence, it can be expected that in the very near future a two-third majority will be very hard to achieve. In that sense, the alternative method of deciding shall most likely become the rule and base method for electing eminent jurists. Furthermore, the two-third majority is not a guarantee that the election of eminent jurists shall be depoliticized and free of foreign influence. To clarify, during the election of eminent jurists, political parties who form that necessary two-thirds majority can enter into an agreement on quotas, which most often happens in political practice.

Seeing as it is hard to achieve a two-third majority in multiparty systems, the constitutional amendments foresee an anti-deadlock mechanism. However, the logic and point of the anti-deadlock mechanism were completely missed (Simović, 2022, pp. 111-112). Namely, the basic idea behind the existence of this alternative mechanism is to motivate initial subjects in the decision-making process to decide, because in the alternative there will be an unfavorable circumstance or sanction. Nevertheless, with respect to the anti-deadlock mechanism in the process of deciding on the eminent jurists, the parliamentary majority is motivated by such constitutional mechanisms to obstruct the initial process of electing four members of the High Judicial Council so that that election would be completed by way of the alternative method, in which it can have significant influence. Therefore, instead of the election of eminent jurists to be completed within the Parliament as the default process, it is not unlikely that that main process for election shall become the exception, and the alternative process to become the rule. Specifically, the process foreseen in the event that the Parliament does not elect all four members within the time period prescribed by law is disputable and unusual. It states that following the expiry of the time period prescribed by law, the remaining members shall be selected from among all the candidates who fulfill the requirements for election by a commission comprised of the President of the National Assembly, the President of the Constitutional Court, the President of the Supreme Court, the Supreme Public Prosecutor and the Ombudsman. Hence, a special commission is created to take over the mandate of the selecting eminent jurists from the parliament, seeing as it was not able to do so within the statutory limitation period. In principle, with the exception of the President of the National Assembly who is *par excellence* politician, the remaining members of this commission should be independent of political powers. However, political reality is different. In the post-socialist experiences to date, the Constitutional Court has always been on the wavelength of current political majority. It has not with any one of its decisions regarding politically sensitive and significant topics, contradicted the expectations of the Government (See Simović, 2016, pp. 51-64). In addition, the constitutional guarantees of independence of the Constitutional Court have significant deficiencies, and the possibility of reelecting judges of the Constitutional Court makes them vulnerable in relation to the parliamentary majority. Consequently, it can be expected of the President of the Constitutional Court to be sensible to the expectations of the parliamentary majority in view of the election of eminent jurists. The Ombudsman is elected by the parliamentary majority, and although in essence the independence of this state body is guaranteed, the Constitution also foresees that it is accountable to the National Assembly. Therefore, even with respect to the Ombudsman it

cannot be concluded that there may be influence of the parliamentary majority. After all, this institution has not shown to be a reliable and consistent protector of citizens' rights, and since the election of the current Ombudsman in 2017 it has become even more marginalized. In accordance with the amended constitutional provisions, the President of the Supreme Court is elected by the High Judicial Council, whilst the Supreme Public Prosecutor is elected by the National Assembly, at the proposal of the High Judicial Council, with three fifths vote of all members of Parliament, hence these two public officers should be outside the scope of the parliamentary majority. Still, consideration should be given to the Constitutional Law for the implementation of Amendments which foresees that the President of the Supreme Court of Cassation and the Supreme Public Prosecutor who have been elected prior to the constitutional amendments coming into force, shall continue to fulfill their role until the expiry of their term for which they have been elected. Seeing as that according to the original constitutional provisions the President of the Supreme Court of Cassation and the Supreme Public Prosecutor were elected by Parliament, and that they started their term of office in 2021, it is practically guaranteed that they will be channels by way of which the current parliamentary majority can influence over the election of eminent jurists.

In addition to the discussed suspicion that those will be the channel of politization of the election of eminent jurists, the membership of the commission has been thoughtlessly conceived considering its corruptive potential. Namely, the President of the Constitutional Court participates in the election of members of the High Judicial Council, and that body participates in the proposal of candidates for the election of judges of the Constitutional Court, which is the mandate of the Supreme Court. Furthermore, the President of the Supreme Court also participates in the selection of the members of the High Judicial Council, and that body, amongst other things, decides on the dismissal. Therefore, the prescribed constitutional provision represents an inadequate mechanism against the blockade in deciding and a hidden channel of politization of the election of eminent jurists.

As it can be concluded, at first glance a model of a Judicial Council that for the most part adheres to the European Standards has been established. However, a more detailed analysis of the constitutional framework of the Judicial Council shows that, obviously tendentiously, hidden mechanisms for the politicization of the judiciary have been left in place. That is one confirmation that the establishment of the European model of the judicial council is not a sufficient guarantee for securing the independence of the judiciary, despite the positive evaluation of the Venice Commission.

5. Conclusion

North Macedonia and Serbia have around the same time constitutionalized their judicial councils. From the perspective of the European model of the judicial council North Macedonia was closer in implementing their sample model, whilst Serbia foresaw constitutional provisions which did not eliminate the channels of political influence over the judiciary. Hence, immediately following the adoption of the 2006 Constitution it was clear that Serbia had to amend its constitution in the part dealing with the judiciary if it wished to tie its future to the European integration process. Although that process did not unwind quickly and easily, the constitutional amendments which constitute the improved model of the judicial council were adopted in 2022. However, what is characteristic for modeling of the new Judicial Council is the fact that the amendments to the part on the judiciary of Serbia was based exclusively on the abstract criticisms of the constitutional provisions from 2006 and the recommendations of the Venice Commission that it was necessary to adhere to the European model of the judicial council. Despite the fact that the Constitution was in force for almost fifteen years, there was no analysis which would evaluate the work of the High Judicial Council. In the event that the work of that body was evaluated negatively, then the next step would be to identify the reasons for that failure. Aside from that, seeing as North Macedonia also had significant experience with the Judicial Council that was more harmonized with the European standards, the results achieved by that body in practice could have been of great value. Therefore, regardless of the significant experiences of these two states, but also the experiences of other post-socialist states, the constitutional reform of the judiciary in Serbia was implemented without serious empirical analysis, but exclusively on the basis of the abstract idea that the European model of the judicial council was optimal solutions and that it should be adopted without criticism.

It would seem that the experience and practice of the North Macedonian Judicial Council can be didactical. The European model of the judicial council, which centralizes the mandates which pertain to all the matters pertaining to the careers of judges and gives judges control over this body is founded on the assumption that the judges are reliable and adequate actors who are aware of their obligations and competent to fulfill them (Bobek & Kosař, 2014, p. 1268). However, consideration is not given to the fact that such a Judicial Council in which the majority is made up of judges can only have independence and authority in a politically mature society. Comparative experiences have shown, as a stronger Judicial Council is being established, its exposure to the impact of the political branches of government increases (Kosař, 2018, p. 1591). Politicians are always in

a position to find a judge who is willing to cooperate with them and who becomes a channel of politicization of the work of that body (Kosař, 2018, p. 1593). That was also evident in the experiences of North Macedonia despite the fact that the constitutional provisions adhered to the European standards to a great extent. In that sense, establishing a European model of the judicial council is not sufficient, and surely not a necessary condition for ensuring the judicial independence. That model is promoted as ideal and it is expected, without criticism, that it shall achieve positive results in each and every state, with almost full disregard for tradition and achieved level of legal and democratic culture. Aside from the complete undermining of the socio-political assumptions for its implementation, the European model of the judicial council falls short in other areas as well. The key criticism directed at the European model of the judicial council is the lack of democratic legitimacy. Leaving the judiciary without any control by external factors in states without democratic traditions and culture could lead to corruption and exclusion of accountability. After all, the Italian model of the judicial council, which is closest to the European model, is continually being criticized due to corporatism, lack of accountability of judges and lack of efficiency (Bobek & Kosař, 2014, p. 1291).

Regardless of all of its imperfections, the European model of the judicial council should not be dismissed. However, post-socialist states, amongst which are Serbia and North Macedonia, should be much more careful whilst accepting this model and instead search for their own authentic models, and not uncritically accepting the ready “magic recipe” which supposedly guarantees success. The experiences of North Macedonia whose model of the judicial council initially was more in line with the European standards, did not even come close to having satisfactory results in practice. However, instead of thoroughly analyzing the practice of its Judicial Council with consideration of the experiences of other states, Serbia is implementing constitutional reforms of the judiciary in which it is inertly and without criticism following the so-called European standard. In that sense, especially taking into consideration the experiences of North Macedonia, it would seem that the constitutional reform of Serbia shall not result in the improvement in the independence of the judiciary, especially seeing as the basic channels of its politicization have not been identified. The unsatisfactory level of independence of the judiciary is undoubtedly not the consequence of weakness in the constitutional framework of the judicial council, but instead a result of issue that go much deeper. Ignoring those key reasons only means that Serbia, despite its constitutional reforms, is still equally far from achieving independence of the judiciary as it was prior to them.

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PROVING ANTITRUST DAMAGES IN CIVIL PROCEEDINGS**
– The Compatibility of Serbian Law with Directive 2014/104 –

Summary

Private competition law enforcement has been a recent phenomenon in the European Union. In the past, the EU law and member states' national laws lacked elements that contributed to the preponderance of private enforcement in the United States, such as treble and punitive damages, the procedural right of a damaged party to request discovery of evidence, collective actions, etc. The interest in private enforcement of competition law has gradually increased after Regulation 1/2003 authorised national courts to implement Articles 101 and 102 TFEU, the EU courts established private enforcement principles, and Directive 2014/104 (Antitrust Damages Directive - ADD) laid down rules to facilitate proving competition law violations and damage resulting from them. The US model evidently inspired the EU legislator. At the same time, ADD attempted to balance the private interests of injured parties and the public interest for effective public enforcement. Specific ADD provisions instigated a public debate concerning their reach and alleged confrontation with general legal principles. Even though member states have taken comprehensive measures to implement ADD, national courts need to search for an equilibrium between private and public interests. Therefore, the full effect of Directive 2014/104 is yet to be seen.

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Private enforcement of competition law in Serbia is still in its initiation phase. The Serbian Competition Protection Act 2009 proclaimed the right of damaged persons to bring actions for damages, even though this right has already existed under the general rules of civil law. The Competition Protection Act failed to stipulate material conditions and procedural rules that would facilitate private enforcement. The Serbian legislator has not yet taken steps to transpose ADD into national law.

This paper first analyses the development and principal features of the US and EU private enforcement models. After that it focuses on the ADD provisions expediting evidence collection and damage assessment. The second part of the paper analyses Serbian tort and civil procedure rules relevant to bringing actions for antitrust damages and case law on antitrust damages. The author concludes with proposals for Serbian legislators to harmonise national law with ADD.

Keywords: Directive 2014/104, antitrust damages, discovery of evidence, quantification of harm, private enforcement of competition law.

DOKAZIVANJE ŠTETE OD POVREDA KONKURENCIJE U GRAĐANSKOM POSTUPKU

– Usklađenost prava Srbije sa Direktivom 2014/104 –

Sažetak

Privatnopravno sprovođenje prava konkurencije je skorašnja pojava u Evropskoj uniji. Dugo vremena pravo EU i nacionalna zakonodavstva država članica nisu imali na raspolaganju institute koji su doprineli jačanju privatnopravne zaštite u Sjedinjenim Američkim Državama, kao što su trostruka naknada štete ili kaznena odšteta, procesno pravo oštećene strane da zahteva otkrivanje dokaza, kolektivna tužba i dr. Interes za privatnopravno sprovođenje prava konkurencije postepeno je porastao nakon što je Uredba 1/2003 ovlastila nacionalne sudove da primenjuju članove 101 i 102 Ugovora o funkcionisanju EU, nakon što su sudovi EU utvrdili principe privatnopravne zaštite, a Direktiva 2014/104 (Direktiva o antitrustovskim štetama) propisala pravila kojima se olakšava dokazivanje povreda prava konkurencije i štete proistekle iz njih. Model Sjedinjenih Američkih Država je

evidentno inspirisao zakonodavca EU. U isto vreme, Direktiva je pokušala da izbalansira privatni interes oštećenih strana i javni interes za delotvorno sprovođenje prava konkurencije. Pojedine odredbe Direktive izazvale su javnu debatu u pogledu njihovog domašaja i navodne suprotstavljenosti opštim pravnim principima. Iako su države članice preduzele sveobuhvatne mere za primenu Direktive, nacionalni sudovi još uvek treba da iznađu balans između privatnih i javnih interesa. Zbog toga, pun efekat Direktive 2014/104 tek treba da se oceni.

Privatnopravno sprovođenje prava konkurencije u Srbiji je još uvek u početnoj fazi. Srpski Zakon o zaštiti konkurencije iz 2009. ustanovio je pravo oštećenih lica da podnesu tužbe za naknadu štete, iako je to pravo već postojalo po opštim pravilima građanskog prava. Zakon je propustio da propiše materijalne uslove i proceduralna pravila koji bi olakšali privatnopravno sprovođenje prava konkurencije. Srpski zakonodavac još uvek nije preduzeo korake da transponuje Direktivu 2014/104 u nacionalno zakonodavstvo.

U ovom članku analiziraju se razvoj i ključne odlike modela privatnopravnog sprovođenja prava konkurencije u SAD i EU. Rad se zatim fokusira na odredbe Direktive 2014/104 koje olakšavaju prikupljanje dokaza i utvrđivanje štete. Drugi deo rada analizira pravila srpskog odštetnog prava i građanskog procesnog prava koja su relevantna za podnošenje tužbi za naknadu antitrustovskih šteta, kao i sudsku praksu u ovoj oblasti. Autorka zaključuje dajući predloge zakonodavcu Srbije za harmonizaciju nacionalnog zakonodavstva sa Direktivom 2014/104.

Ključne reči: Direktiva 2014/104, antitrustovske štete, otkrivanje dokaza, kvantifikacija štete, privatnopravno sprovođenje prava konkurencije.

1. Introduction

Persons injured by competition law violations are entitled to request compensation for damages from competition law infringers. An injured party can bring an action for damages before civil courts and ask the court to determine ancillary civil sanctions. For a long time, private enforcement has been neglected in the EU and its member states. The European Commission – EC and national competition authorities of member states pursued public enforcement to protect

the public interest in maintaining and strengthening competition in the EU internal market. The interest in private enforcement has gradually increased after adopting Regulation 1/2003, authorising national courts to enforce competition law, and enacting Directive 2014/104 (Antitrust Damages Directive – ADD). The ADD aims to remove obstacles to private enforcement by harmonising national civil procedure rules. ADD rules facilitate proving the competition violation, the causal link between the violation and the damage, and the damage assessment.

The Serbian legislator has not transposed the ADD rules into national law yet. Therefore, general rules of tort and civil procedure law apply to actions for antitrust damages. This paper first analyses the role and significance of private competition law enforcement by comparing the US and EU models. After that it presents the development of private enforcement in the EU and analyses the ADD provisions facilitating the collection of evidence and assessment of damage in antitrust damages actions. In the last part of the paper, we analyse Serbian tort and civil procedure law and case law concerning actions for antitrust damages. We conclude by proposing measures to harmonise Serbian law with the ADD.

2. Public and Private Enforcement of Competition Law

Competition law has been traditionally enforced along two enforcement lines – public and private. Public enforcement encompasses investigating and sanctioning competition restrictions by public authorities, whether administrative bodies or criminal prosecutors and courts. Victims of anti-competitive behaviour of economic operators carry out private enforcement. Competitors, customers and consumers can bring charges before civil courts asking for compensation for damages and other civil remedies available under the relevant national law. The preponderance of public or private enforcement in various national jurisdictions resulted from the historical development of competition law, specific features of a national legal system and other factors.

For example, in the United States, the cradle of antitrust law, both public and private enforcement methods have developed almost simultaneously since the enactment of the Sherman Act in 1890. The Sherman Act defined acts in restraints of trade as criminal acts. The Clayton Act of 1914 authorised the Antitrust Division of the Department of Justice and the Federal Trade Commission to investigate and prosecute alleged violations of federal antitrust laws. At the same time, the Clayton Act allowed private parties to bring about charges seeking compensation for damages resulting from violations of antitrust laws. It is worth mentioning that this possibility existed even before the enactment of the Sherman Act

under common law principles. Several features of the US system have encouraged private enforcement of antitrust law. Firstly, the Sherman Act originally laid down the authority of a court to triple the actual amount of harm caused by antitrust law violations (treble damages). Secondly, under procedural laws of US states, courts are entitled to increase compensation for damage to sanction a violator and deter any future violations (punitive damages) (Gerber, 2007, p. 427). Thirdly, US procedural law allows parties in the pre-trial phase to request information and documents from another party, sometimes even from third parties. This procedural right increases the chances for a plaintiff to prove the causal link between the anti-competitive act and the damage (Chapman, 1978). Finally, the availability of class actions representing numerous plaintiffs in civil disputes has contributed to the increased popularity of antitrust damages charges. From 2005 to 2020, US consumers were afforded over 32 billion USD in compensatory relief through settlements (Bartholomew, 2022, p. 1335).

In Europe, public enforcement of competition law prevailed between the two world wars and after WWII. Administrative authorities were traditionally entrusted with applying competition law in most European countries that broadly followed the German and the EU model (Marković-Bajalović, 2022). Council Regulation 17/62 authorised the European Commission with powers to investigate and sanction violations of Arts. 85 and 86 of the EEC Treaty.

The mainstream legal theory emphasises differences between public and private competition law enforcement. The principal goal of public enforcement is to deter economic operators from breaching competition law (Hüschelrat & Peyer, 2013, p. 3). By imposing high fines on competition law infringers, competition authorities impound illegal profits from companies involved in anti-competitive practices. High fines deter other economic operators from applying similar practices. Private enforcement aims principally to compensate damages caused by anti-competitive actions. These damages can consist of higher (monopoly) prices that clients and consumers must pay for products sold in markets where competition is restricted. Competitors can suffer damage in the form of lost profit after being expelled from the market by the anti-competitive practices of their rivals. In short, while public enforcement protects the public interest – the need to maintain effective competition in the market, private enforcement remedies the harm induced to private persons.

Private enforcement can also assist in realising the public interest. The higher the probability of imposing the obligation to compensate damages upon competition law infringers, the greater the deterrent effect. The US example confirms this finding. Treble damages are possible under federal laws and the laws of most US states, while punitive damages are available in all but five US states (Nagy, 2022,

p. 224). Gerber explains that the private plaintiff in the US system plays a role of a “private attorney-general”: “She is cast as a surrogate for the government.” (2007, p. 437). The possibilities of strategic litigation, anti-competitive rival suits and free-riding on the administrative authorities’ enforcement results represent the principal deficiencies of private enforcement. It is unclear, however, whether private enforcement leads to over-enforcement or under-enforcement of competition law (Hüschelrat & Peyer, pp. 8-9). Regardless of the success of private anti-trust litigation measured in the millions of dollars of damages awarded, a closer look reveals that the effectiveness of private enforcement can be decreased by introducing new procedural rules less favourable to the plaintiffs (Bartholomew, pp. 1342-3). Despite these hurdles, private enforcement has prevailed in the US in recent years. While private actions accounted for only 5% before 1950, they now represent 95% of antitrust cases (Wish & Bailey, 2023, p. 6).

3. Development of Private Enforcement in the European Union

The EU competition law enforcement system, established by Regulation 17/62, effectively limited private enforcement. Arts. 85 and 86 of the EEC Treaty (Arts. 101 and 102 of the Treaty on the Functioning of the EU – TFEU) did not foresee the possibility of civil actions for damages caused by a breach of competition rules. This issue was left to the member states’ national laws, which differed very much regarding the scope and effectiveness of civil protection. In some member states, like Germany, the issue was controversial regarding availability and personal reach (Ullrich, 2021, p. 608). In Spain, commercial disputes involving damages for anti-competitive behaviour mostly concerned vertical agreements and abuse of dominance (Marcos, 2018, p. 3).

Under Regulation 17/62, the Commission had the power to individually exempt agreements from the general prohibition set out in Art. 85(1) of the EEC Treaty. Thus, civil actions were possible concerning agreements not being notified to the Commission for an exemption or the Commission issuing a negative decision regarding a notified agreement. Harmed persons could sue for damages only if the Commission’s administrative decision confirmed a competition rules violation or the violation was manifest and easy to prove.

The Court of Justice of the EU – CJEU fostered private enforcement of EU competition law in the case C-453/99 *Courage*. The case concerned the nullity of a lease agreement containing a clause obligating the tenant to exclusively buy a specified quantity of beer from the landlord during the validity of the lease agreement. The landlord sued for damages since the tenant did not fulfil this

obligation. The defendant advanced the nullity of the agreement argument by advocating that the exclusivity clause violated EU competition rules. The issue arose as to whether a party to an illegal agreement may seek protection from civil actions by invoking the prohibition of the agreement under competition law. The UK court referred the case to the CJEU, asking for a preliminary ruling. The CJEU answered positively to this question, stressing that any individual can rely on a breach of the Treaty rules on competition, even where he is a party to a contract liable to restrict or distort competition within the meaning of that provision (para. 24). The CJEU went on to say in paras. 26-27:

“The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

The CJEU also dealt with the issue of indirect damages in the context of a competition law violation. In the *Kone* case, C-557/12, the CJEU answered whether a damaged party could ask for compensation for damages consisting of higher prices it had to pay for goods, even though it did not buy them directly from a member of a prohibited cartel but from a seller who benefited from higher prices imposed by cartel members on the same market (so-called ‘umbrella effect’). The CJEU stressed in para. 33 of the decision that “the full effectiveness of Art. 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.”

Council Regulation 1/2003 opened the door for private enforcement of EU competition rules in two ways. Firstly, it authorised in Art. 6 national courts of the member states to apply Arts. 81 and 82 of the EC Treaty (TFEU Arts. 101 and 102). Secondly, it eliminated the parties’ obligation to notify an agreement to the EC to obtain an exemption under Art. 81(3) of the Treaty (Art. 101(3) TFEU). It left the parties to assess whether their agreement falls under Art. 81(1) prohibition. Concerning private enforcement, it meant that parties to the agreement and

third parties needed not to wait any more for the EC to decide whether the agreement contravened Art. 81(1). Parties could sue directly in court, asking the court to nullify the agreement, while third parties could sue for damages resulting from the execution of the prohibited agreement.

Regulation 1/2003 did not lay down detailed rules for enforcing competition rules in national courts. It remained the subject of the national law of member states. Besides, it was unclear whether Arts. 81 and 82 of the EC Treaty (101 and 102 TFEU) provided a legal basis for the compensation of damages claim. The CJEU acknowledged that Treaty articles are directly applicable. However, it has never explicitly said that an individual could base his claim for damages upon them (Hauser & Otto, 2021, p. 148). The CJEU committed to establishing substantive law principles to ensure the uniform application of EU competition law before national courts. For example, in the case C-724/17, *Vantaan v. Skanska*, the CJEU stated that the concept of undertaking also applies when determining persons liable for damages caused by infringing competition laws. This means that a company group can be found responsible for damage resulting from a violation of competition law of one of its members.

On the procedural side, EU law has established two general requirements, also observed in civil proceedings related to actions for antitrust damages: the principles of equivalence and effectiveness. Regarding the equivalence principle, national rules governing competition law enforcement in civil proceedings must not be less favourable than other rules related to similar domestic actions. The second principle concerns access to justice for victims of competition infringements. National rules should not make enforcement of EU competition law practically impossible or effectively difficult (Nagy, 2022, p. 226). These principles also extend to national substantive rules, such as rules regarding proving a causal link between a competition infringement and damage.

4. Directive on Antitrust Damages

In 2014, the European Parliament and the Council adopted the Antitrust Damages Directive – ADD to lay down rules ensuring the effective and consistent application of Arts. 101 and 102 TFEU through private enforcement. Every person who has suffered harm from an infringement of competition law can effectively exercise the right to claim compensation. The ADD Art. 3 guarantees injured persons full reimbursement, including repayment of actual loss and loss of profit, plus interest payment. At the same time, the ADD prohibits overcompensation in the form of punitive, multiple and other types of damages.

4.1. Disclosure of Evidence

Most of the ADD is devoted to solving procedural issues identified as the main obstacles to effective private enforcement. As already noted, harmed persons wishing to bring charges for recovery of damages face the problem of proving a causal link between an unlawful action of a competition law infringer and the damage caused. Most evidence is in the infringer's or third party's possession. It is often difficult, if not impossible, for the injured party to obtain this evidence by relying upon the member states' general rules of civil procedure. To solve this problem, the ADD has laid down rules on the disclosure of evidence. Art. 5(1) provides that national laws of member states must stipulate measures providing for the right of a claimant to request from a court to order the defendant or a third party to disclose relevant evidence in their possession, provided that the claimant has presented the court with a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. Even though many member states already had rules on the disclosure of evidence, the ADD has widened their scope. For example, courts in Spain are now authorised to allow requests to discover evidence in the pre-trial phase (Marcos, 2018, p. 28). Germany and Portugal also opened the possibility of asking for evidence in a pre-trial stage. This possibility has already existed in Ireland, England, and Wales (Rodger *et al.*, 2019, p. 488). However, this is not the case in Lithuania, where access to evidence in pre-trial situations is impossible (Malinauskaite & Cauffman, 2018, p. 501). Besides, while member states' national laws normally enable a party to ask for a specific evidence item, the ADD in Art. 5(2) authorises parties to request 'categories of evidence'.

Several principles, such as equivalence, effectiveness, and proportionality, frame the parties' right to ask for the discovery of evidence. In the *Pfleiderer* case, C/360/09, the CJEU referred to the principles of equivalence and effectiveness when instructing the German court on balancing the rights of the parties and the public interest. In the para. 31 of the decision, the CJEU stated that national courts should conduct a "weighing exercise" case-by-case basis, according to national law and considering all relevant factors in the specific case. The ADD went further by specifying in Art. 5(3) elements that national courts need to consider when deciding to allow the disclosure of evidence:

- a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

- c) whether the evidence the disclosure of which is requested contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

The proportionality principle becomes relevant when a national court decides upon a request to disclose evidence containing confidential information. On the eve of the ADD adoption, the issue arose before the EU courts concerning balancing between the right of a harmed person to obtain evidence needed to support its damage claim and the protection of the public interest in cartel cases. The confidentiality of leniency applicants' statements is pivotal to safeguarding cartel participants who notify a competition authority about the existence of a cartel and ensuring the effectiveness of cartel investigations. The General Court highlighted this concern in the *AXA Versicherung* case, T/677/13:

“Leniency programmes are useful tools to uncover and bring an end to infringements of the competition rules, thereby contributing to the effective application of Articles 101 and 102 TFEU. Furthermore, the effectiveness of these programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that the prospect of such disclosure would deter persons involved in an infringement of the competition rules from having recourse to such programmes.”

The General Court established in the *Pilkington* case, T-462/12, para. 87, that a potential disclosure of information should not go beyond what is necessary to protect the interests of the persons concerned. In the *Donau Chemie* case, C/536/2011, the CJEU ruled that national courts can disclose even documents related to the leniency application, and they may not systematically reject access to these documents. The CJEU stated in paras. 46 and 48:

“Given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union, the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence.”

“It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.”

The ADD laid down in Art. 5(4) a general rule that national courts should have a right to order the discovery of confidential information. At the same time, they must dispose of effective measures to protect such information. Based on Art. 5(7), a national court must provide parties from whom the disclosure of the information is sought with an opportunity to be heard before it orders disclosure.

The right to request the disclosure of evidence also extends to evidence kept by a competition authority. However, the ADD departed from CJEU case law by introducing several limitations on the right to request a competition authority to disclose confidential information.

Firstly, a court may order the disclosure of several categories of evidence (so-called ‘grey list’) only after the competition authority has closed its proceedings to not jeopardise an investigation:

- information prepared by a natural or legal person specifically for the proceedings of a competition authority;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings;
- and settlement submissions that parties have withdrawn.

Secondly, the ADD prohibits in Art. 6(5)(6) disclosing leniency statements and settlement submissions (‘black list’). Some member states, like Belgium, even expanded the ban on disclosing leniency statements by prohibiting access to all documents and information submitted by a leniency applicant rather than just leniency statements (Malinauskaitė & Cauffman, 2018, p. 504). The courts are entitled to protect injured parties from defendants possibly abusing this limitation. Based on Art. 6(7) ADD and upon a reasoned request of a claimant, the national court will examine whether the content of evidence exempted from disclosure complies with the notions of leniency statements and settlement submission as defined in Art. 2 of the ADD. The courts may ask competition authorities to assist in making this examination.

Thirdly, in line with Art. 6(11) ADD, national competition authorities should be able to submit their observations, upon their initiative, to a national court to assess the proportionality of disclosure of evidence included in the authorities’ files in light of the impact such disclosure would have on the effectiveness of the public enforcement of competition law. Member states need to set up a system whereby a competition authority is informed of requests for disclosure of evidence when one of the parties in the court’s proceedings is involved in that competition authority investigation. Most member states have created mechanisms by which courts will notify the national competition authority or the EC of a

request to access documents included in its files and invite it to submit comments (Rodger *et al.*, 2019, pp. 490-491). By giving competition authorities the right to submit observations, the ADD aims to ensure the balance between the effectiveness of public enforcement and protecting the private interests of damaged parties. It is reasonable to assume that competition authorities will tend to preserve the effectiveness of public enforcement, and the courts will be inclined to respect their opinion to the detriment of private enforcement (Chirita, 2017, p. 156). For example, the EC *de facto* derogated the ADD provision, allowing the discovery of withdrawn settlement submission by its Notice on the conduct of settlement procedures. Recital 35 of the Notice says that the EC will grant access to settlement submissions only to parties to whom it addressed a statement of objections which have not requested settlement. The EC will not grant other parties, such as complainants, access to settlement submissions. The Notice remained in force after the ADD adoption despite conflicting provisions.

The ADD gave the green light to competition authorities to rely almost exclusively upon a leniency regime and settlements to detect and sanction cartels and other serious competition infringements (Chirita, 2017, p. 169; Migani, 2014, p. 104). It is worth remembering that, before the enactment of the ADD, the General Court blocked the EC's opportunistic rejection of access to files to persons seeking compensation for damage resulting from competition infringement in its judgment in *Hydrogene Peroxide v. Commission*, T-437/08, based on the following arguments: 1) the interest of a company which took part in a cartel in avoiding actions for damages cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving protection (para. 49); 2) the refusal of disclosure of any document likely to undermine the EC's cartel policy because of the fear of applicants of being the prime targets of actions for damages is not acceptable, since it would amount to permit the EC to avoid the application of the Transparency Regulation (Regulation 1049/2001), without any limit in time, to any document in a competition case merely by reference to a possible adverse impact on its leniency programme (paras. 60-70); 3) nothing in the Transparency Regulation leads to the supposition that EU competition policy should enjoy, in the application of that regulation, treatment different from other EU policies (para. 72); 4) leniency and co-operation programmes are not the only means of ensuring compliance with EU competition law since actions for damages can make a significant contribution to the maintenance of effective competition in the EU (para. 77).

The courts may order the release of the parts of the evidence which do not fall under exemptions specified in Art. 6 of the ADD. This power aims to protect the interests of a damaged person. Whenever a document or another piece of

evidence contains information prohibited from disclosure and other information, the court will consider the possibility of disclosing parts of the document revealing non-confidential information.

Finally, where a claimant has obtained evidence solely through access to the file of a competition authority, this evidence shall be deemed inadmissible in actions for damages. Again, the ADD distinguishes categories of evidence concerning their admissibility in courts. Under no circumstances can courts admit as evidence leniency statements and settlement submissions obtained by parties who had access to the file of a competition authority (Art. 7 para. 1). Evidence categories from the 'grey list' are inadmissible in courts until the relevant competition authority has closed a proceeding by adopting a decision or otherwise (Art. 7 para. 2). Other evidence obtained through access to files can be used in courts only by persons who executed the right to access file and their successors (Art. 7 para. 3).

The effectiveness of the right to request disclosure of evidence is guaranteed by the court's power to impose penalties upon a party or a third person not complying with the court's order (Art. 8).

4.2. Effect of a Decision Determining Competition Infringement on Civil Proceedings

Based on ADD Art. 9(1), a final decision of a competition authority or a reviewing court establishing a competition law infringement constitutes irrefutable proof in proceedings concerning actions for damages. A claimant can present a final decision of a competition authority of another member state determining competition infringement before a national court as at least *prima facie* evidence that an infringement of competition law has occurred (Art. 9 para. 2).

Art.16 of Regulation 1/2003 already made the EC's decisions binding on national courts and national competition authorities to ensure consistent application of the EU competition law by national authorities. Building upon Regulation 1/2003, the ADD interferes with the validity of national administrative authorities' decisions before national courts by obliging courts to accept final administrative decisions as irrefutable proof of a competition violation. ADD commentators observed that this rule was not in line with the constitutional principles of separation of powers and independence of judges in force in many member states (Rodger *et al.*, 2019, p. 495).

Despite these concerns, many member states copy-pasted ADD Art. 9(1) into national law. For example, the Croatian Law on Proceedings for Compensation of Damages from Competition Law Infringements from 2017 established in Art. 11 that a final decision of the Competition Protection Agency determining a

competition law infringement or a decision of the High Administrative Court of Croatia confirming the Agency's decision constitutes an irrefutable proof to bring actions for damages. Even before the ADD transposition into Croatian law, Croatian courts considered the decisions of the Competition Protection Agency as *de facto* binding (Pecotić-Kaufman, 2012, p. 32).

Italian Law No. 114 of 9 July 2015 (*Legge Delega*) authorised the Government to implement the ADD. The Government adopted a Legislative Decree in 2017. The Decree stipulated that an Italian Competition Authority's final and conclusive decision and a judgment issued by administrative courts reviewing the competition authority decision shall have a binding effect before national courts. The conclusive effect is limited to the factual analysis of a competition law infringement (Caiazza, 2016, p. 111). The Decree extended the powers of administrative courts concerning the scope of judicial review of decisions of the competition authority. The courts are now authorised to verify the facts and technical analysis fully. This novelty is important since Italian administrative law had traditionally restricted administrative courts' powers to a legality review of an administrative decision. The ECHR, in the case *A. Menarini Diagnostics S.r.l. v. Italy*, No. 43509/08, 27 September 2011, remarked on the limited scope of judicial review of administrative decisions in Italy. The Italian Cassation Court took the stance in the *Acea-Suez* decision No 2013/2014 that the administrative court must verify facts and relevant technical profiles upon which a decision of the competition authority is based. However, when such technical profiles involve discretionary evaluations – for example, the definition of the relevant market – such review should be limited to verify if the decision taken by the authority is reasonable, rational and congruent and if the authority has not exceeded the discretionary limits. Under the new legal framework established by ADD, it has become impossible to follow the old model of limited judicial review in administrative disputes, considering that a final decision of the administrative court serves as irrefutable evidence concerning the existence of competition infringements before civil courts. At the same time, the defendant's procedural rights in civil proceedings are not restricted since the defendant could already present exculpatory evidence in proceedings before the competition authority and administrative court.

The ADD is silent as to whether the binding effect of a final administrative decision determining competition law infringement extends to the issue of the infringer's guilt. In many national jurisdictions, infringer's *culpa* is the essential element of liability for damage, except for cases of strict liability. In line with the CJEU judgment in *Hoffmann-LaRoche v. Commission*, case 85/76, an infringement of EU competition law is an objective concept. It is not necessary to prove fault to constitute responsibility for competition violations. However, the EC will

consider guilt among aggravating factors when determining a fine amount based on Guidelines on the method of setting fines, para. 28. It remains unclear whether a claimant in damages proceedings can invoke a competition authority decision as proof of an infringer's guilt (Bukovac Puvača, 2021, p. 16). Spanish professor Marcos states that "the binding effect of the competition authority's prior decision extends to all the features of the declared findings and resolutions related to the infringement included therein: facts, infringing parties, proof of their behaviour and assessment of the prohibition infringed" (2018, p. 20). Indeed, this opinion is consistent with the ADD preamble explanation concerning the scope of the binding effect of decisions of competition authorities and reviewing courts (Recital 34).

Ratio legis of the norm constituting the binding effect of a decision determining competition law infringements is legal certainty, consistent application of EU competition law and effectiveness and procedural efficiency of damages actions. However, this does not mean that a damages court is prevented from determining additional facts not included in a decision concerning competition law infringement. Besides, a damaged person must prove a causal link between a competition infringement and damage suffered.

4.3. Causal link

The ADD devoted several articles to the issue of indirect damages. Under Art. 12, anyone who has suffered harm can claim compensation, irrespective of whether he is an infringer's direct or indirect purchaser. When an indirect purchaser claims compensation for damage, he bears the burden of proof that a price overcharge was passed on to him and the scope of such passing on (ADD Art. 14 para. 1). The price overcharge represents the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law (ADD Art. 2 recital 20).

The rule constituting an obligation for a damaged party to prove the causal link is generally in line with member states' national laws. National courts of member states developed case law recognising the right to claim damages to an indirect purchaser. For example, the German Supreme Court held in KZR 75/10 (FRG) No. 46, 28 June 2011, that indirect purchasers should be able to bring damage claims against cartel members. Each cartel member is jointly and severally liable for damage caused to a direct or indirect purchaser. However, a defendant can object to the damage claim of the direct purchaser by proving that he had passed on the damage to indirect purchasers (passing-on defence). The burden of proof of the passing on of the overcharge lies with the defendant. The trial judge can estimate

the damage caused by the cartel (Kersting & Dworschak, 2012, p. 777). In the case *Gouessant*, No. 540, the French Cassation Court admitted indirect purchasers the right to claim damages based on the general rules of French tort law. The Court stated that it was for the claimant (a direct purchaser) to prove that he internalised an overcharge, i.e., he could not pass it on to indirect purchasers.

Under ADD Art.14(1), the burden of proof concerning the existence of damage, its amount, and the presence and the amount of passing-on lies with a claimant. Aiming to increase the effectiveness of damage actions, the ADD has introduced a rebuttable presumption that the passing-on occurred. The presumption resulted from the *communis opinio* that direct buyers of a dominant seller or cartel members usually pass on an overcharge by increasing prices charged to their buyers. The French Cassation Court in *Gouessant* has confirmed this opinion. Under ADD Art. 14(2), it will be deemed that an indirect purchaser has proved the passing-on if he has shown the following:

- a) the defendant has committed an infringement of competition law;
- b) the infringement has resulted in an overcharge for the direct purchaser of the defendant; and
- c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law or has purchased goods or services derived from or containing them.

The infringer can rebut the presumption if he credibly demonstrates to the court's satisfaction that the actual loss has not been passed on (or not entirely) to the indirect purchaser.

The EC issued the Guidelines to facilitate calculating the amount of overcharge. The Guidelines present economic theories explaining the incentives for passing on overcharges, methods, and evidence used to prove the overcharge passing-on and its amount. Proving the occurrence of passing-on and its amount requires presenting the court with complex economic evidence, effectively preventing successful damages claims. For this reason, ADD Art. 12(5) obliges member states to provide national courts with the power to estimate, under national procedures, the share of any overcharge that was passed on.

4.3. Quantification of Harm

A general rule of civil law states that a claimant must prove the existence and amount of damages. Regarding antitrust damages actions, the exact calculation of damages is hardly possible. The quantification of damages implies a

comparison of the actual position of the injured person with the position this person would have been in without the infringement. Making this comparison presupposes knowing with certainty how market conditions and the interactions between market operators would have evolved in the scenario where the infringement would not have occurred.

ADD Art. 17(1) requires member states not to introduce rules which would render the exercise of the right to damages practically impossible or excessively difficult. The ADD facilitates the execution of this right by laying down two rules. The first rule concerns the power of national courts to estimate damages. The second rule stipulates a rebuttable presumption that cartels cause harm (Art. 17 para. 2). The German Supreme Court ruled in KZR 25/14, 12 July 2016, that the presumption of the existence of harm logically implies that there are damages. A trial court is entitled to apply civil procedure rules, allowing it to estimate damages. Three member states expanded the scope of presumption by defining the amount of harm caused. Hungarian and Latvian laws stipulated that cartels cause an overcharge of 10%, while Romanian law provided a presumption that an overcharge amounts to 20% (EC, 2020). Swedish law allows courts to estimate damages if it is impossible or excessively difficult to quantify, but also if collation of evidence would cause costs or inconvenience disproportionate to the damage's size and if the claim for damages concerns a small sum (Rodger *et al.*, 2019, p. 500).

In 2013, the EC produced a Practical Guide on quantifying harm in actions for damages based on breaches of Arts. 101 or 102 TFEU. The Guide specifies methods and techniques for calculating harm, including damages caused by a rise in prices, loss in sales volume, and loss of profit suffered from exclusionary practices. Some member states, for example, Lithuania, obliged courts to follow the Practical Guide, even though the Directive does not stipulate this requirement (Malinauskaite & Kauffman, 2018, p. 510).

5. Antitrust Damages in Serbian law

The Serbian Competition Protection Act – CPA stipulates in Art. 73 the right to claim damages resulting from an infringement of competition law determined by the Commission for Protection of Competition – CPC decision in civil proceedings. CPA does not regulate the circle of persons entitled to claim damages and the conditions for the execution of this right. The only exception is the rule contained in Art. 73 para. 2: “A decision of the Commission does not make a presumption that damage occurred, but it has to be proved in court's proceedings.” Besides, the CPA does not regulate the CPC decision's effects in civil court

proceedings. In general, Art. 73 of CPA refers to rules of tort law concerning the enforcement of the right to ask compensation for damage resulting from a violation of competition law.

Serbian Law on Obligations – LO lays down rules on damages. Art. 16 sets a general prohibition of harmful acts: “Everyone has a duty to refrain from acts causing harm to another person.” Art. 154 para. 1 LO establishes a presumption of guilt. A person causing harm to another person must compensate for this harm unless he proves that harm was caused without his guilt. However, a special law can stipulate that liability for damage exists regardless of guilt (strict liability) (Art. 154 para. 3 LO). Art. 73 CPA is silent regarding the fault as the necessary element of liability for antitrust damages. In the light of Art. 154 para. 3 LO, it is impossible to interpret CPA as constituting a right to compensation for damage caused by competition infringements as strict liability.

Serbian law recognises the right to full compensation. Art. 155 LO defines damage as material damage – a decrease of someone’s property (*damnum emergens*) and prevention of its increase (*lucrum cessans*), and immaterial damage – causation to another person of physical or mental pain or fear. Based on Art. 189 para. 1 LO, a harmed person has a right to ask compensation for simple damage (*damnum emergens*) and lost profit (*lucrum cessans*). Under Art. 190 LO, a court determines compensation by taking into account circumstances that have arisen after the damage was caused, in the amount needed to bring the material situation of a damaged person into the state in which it would have been if a harmful act or omission had not occurred.

A damaged person bears the burden of proof of a causal link between a harmful act and damage. Serbian law has long recognised the right to claim direct and indirect damages. The Supreme Court of Serbia passed the ruling GŽ 2736/66 in 1966:

“An injurer is liable for every harm that can be attributed to his actions, that is, all direct and indirect consequences of his act. If an action causes harm, it is therefore indifferent whether the harm is direct or indirect – a further consequence of an act and/or omission of the injurer, but in this case, it is necessary to determine whether the occurred harm is an indirect consequence of the injurer’s act.”

With regard to the causality link between a wrongful act and indirect damage, the Serbian legal mind accepts the theory of adequate causation. It is considered that damage is a consequence of a cause that produces appropriate harmful effects under ordinary circumstances (Ivošević, 1994, p. 438; Radišić, 1988, pp.

203-210, Đurđević, 1995). The role of causation is especially significant in the area of strict liability. The causation is, at the same time, a condition and legal basis of strict liability (Salma, 1997, p. 227).

A plaintiff must also prove the occurrence and amount of damage. In practice, courts rely on expert witnesses to calculate damages. Punitive damages are only exceptionally allowed in Serbian law. In line with Art. 189(4) LO, when a thing is destroyed or damaged by a criminal act performed intentionally, a court can determine an amount of compensation according to the value that the thing had for the damaged person. A prevailing part of the Serbian legal theory considers this provision to define yet another type of material damage. It does not entitle a damaged person to ask compensation for pain suffered from a loss of a thing that had sentimental value for him (*pretium affectionis*) (Karanikić Mirić, 2011, pp. 74-75).

Art. 232 of the Serbian Civil Procedure Act provides authority for a court to determine the amount of compensation based on its free assessment under a condition that it is impossible to determine the exact amount of compensation, or it can be done only under disproportional difficulties. The principle of fairness justifies the rule: an action of a damaged person should not be refused only because of issues related to proving the amount of damage. The scope of the court's authority relates only to damage calculation. The court still needs to verify the existence of the very right to compensation (Poznić & Rakić-Vodinelić, 2015, p. 362).

Serbian courts have the power to request a party in the procedure to submit a document for which another party claims it is in her possession. The effectiveness of this power is seriously undermined by the right of the requested party to deny submission of the document if the submission would expose her to significant material damage (CPA Art. 241, in connection with Art. 249 para. 1). The court can order a third party to submit a document only if she is obliged to do it by law or the document content is common to her and the party in the proceeding (CPA Art. 242 para. 1).

Article 12 of the Civil Procedure Act entitles civil courts to solve preliminary issues autonomously. Whenever a court's decision depends on a preliminary issue of whether a legal right or relationship exists, a court can solve this issue provided that another court or organ has not rendered a decision and special laws do not prescribe differently. A decision of a court concerning the preliminary issue produces effects only in a dispute in which it was raised. An important exception to this rule is when a party requests a court to decide upon a preliminary issue in a judgment petite. In such a case, a final court's judgment solving the preliminary issue becomes *res iudicata*. Legally binding criminal court's judgments bind civil courts. The same is valid concerning legally binding civil court judgments.

The Civil Procedure Act is silent regarding the effect of a legally binding act of an administrative authority in civil proceedings. The Supreme Court of Serbia took the stance in the case Rev. II 619/05, 20 October 2005, that a final and conclusive administrative act binds a civil court. The Serbian legal theory takes an identical position by interpreting Art. 12 *argumentum a contrario*: a court cannot decide upon a preliminary issue if another court or organ has already finally settled it (Poznić & Rakić-Vodinelić, 2015, pp. 343-344).

Serbian courts have occasionally dealt with actions for antitrust damages. In the renowned case concerning the nullity of the agreement concluded between the City of Novi Sad and a private bus terminal company, Prev. 58/2013, Pzz 1/2013, 9 May 2013, the Supreme Cassation Court – SCC decided on the legality of the lower courts' decisions determining the right to damages resulting from non-performance of the agreement.

A private investor bought a bus transportation company in the privatisation process. The company operated a bus terminal in the City of Novi Sad. It concluded an agreement with the City of Novi Sad obliging to effectively guarantee the company the exclusive right to operate the inter-city bus terminal in the territory of Novi Sad. The existing inter-city bus terminal operated by another public bus terminal company should have stopped providing services to inter-city transporters. The City of Novi Sad did not perform the obligation, and the company sued for damages consisting of the profit lost due to the continuation of the operation of the public company bus terminal. In the role of a defendant, the City of Novi Sad pleaded the nullity of the agreement. The lower courts found that the parties agreed to establish the monopolistic position for the claimant and that this agreement was contrary to the imperative norms of Serbian law. Art. 14 LO prohibits parties in contract relationships from creating rights and obligations by which any person establishes or uses a monopolistic position in the market. The agreement also infringed Art.2 of the Competition Protection Act from 2005. The lower courts declared the nullity of the agreement and recognised the claimant's right to damages.

The SCC decreased the compensation determined by the lower courts by referring to LO Art. 104 concerning the consequences of nullity. In the case of nullity of an agreement, each party must return to the other what it received under the agreement. However, if the nullity resulted from a violation of imperative norms, public order or good customs, a court can dismiss, partially or entirely, the request of an unconscientious party. When applying Art. 104 LO, the court considers the conscientiousness of each party, the significance of the threatened good or interest, and ethical norms. The SCC found that both parties were unconscientious since they knew or ought to have known they contracted

the illegal clause. For this reason, it decided to dismiss the claimant's request for compensation of damages partially. The SCC explained that, under these circumstances, it was fair that both parties partly suffered damages.

It should be emphasised that Art. 104 LO does not relate to the right to damages. It sets up a duty of parties to a null agreement to return to each other what they gave under the agreement. Art. 108 LO lays down an obligation for a party guilty of the nullity to compensate damages to another party. Even though the SCC found both parties guilty, it admitted the claimant's action for damages partially by invoking the analogous application of Art. 104 LO.

6. Conclusion

Serbian law allows private enforcement of competition rules under general tort and civil procedure provisions. An injured person can bring a standalone or follow-on action for damages caused by competition law infringements. Suppose the Commission for Protection of Competition has rendered a decision finding a competition law infringement, and its decision has become final. In that case, injured persons can invoke the decision before a civil court as proof of an unlawful act. A claimant still needs to prove the causal link between the illicit act and damage and the amount of damage. A defendant's guilt is presumed. In standalone actions, the claimant must prove that the defendant breached competition rules. Under Serbian tort law, asking for compensation for indirect damages is possible. Courts are entitled to estimate damages when the exact amount is impossible or extremely difficult to prove. Punitive damages are generally not allowed.

Despite the broad consistency of Serbian civil law with the EU private enforcement rules, Serbian legislators need to stipulate specific substantive and procedural rules to facilitate private enforcement of competition law and harmonise with ADD. General rules on torts and civil procedure show typical deficiencies similar to those that had existed in the national laws of the EU member states: a limited right to ask for the discovery of evidence, lack of clear rules on the binding effect of the competition authority final decisions, lack of legal presumptions concerning the existence of harm and the causal link between cartel infringements and damage, etc. Enacting specific regulations streamlining private enforcement would also contribute to more effective public enforcement since competition law violators would face the risk of paying high fines cumulatively with damages.

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SUPREME COURT OF JUSTICE – COMPETENCES AND STRUCTURE ACROSS EUROPE

Summary

The article provides comprehensive overview of the diverse landscape of supreme courts across Europe, offering insights into varying structures and functions they embody across different countries. It analyses supreme courts as the only supreme judicial institution or as a part of a broader supreme court system alongside supreme administrative court and/or constitutional courts.

The article highlights the diversity in organization of supreme justice and offers a glimpse into a larger project on comparative supreme justice, indicating in-depth analysis of various factors such as the position of supreme courts in different states, recruitment process and the courts' competencies on the European scale. The article provides valuable insights into the complex and multifaceted nature of supreme courts in Europe. Its approach to presenting specific examples enables a deeper understanding of the topic, making it a useful resource for readers interested in comparative legal systems and judicial structures in different countries.

The paper identifies impact of filter model on a Supreme Court's workload and efficiency of the Court, as well as on the structure. Furthermore, it refers to possible shortcomings of filter model and the jurisprudence of the European Court of Human Rights in that regard.

Keywords: Supreme Court, comparative jurisdictions, unification of case law, filter, and admissibility criteria.

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VRHOVNI SUD – NADLEŽNOSTI I STRUKTURA U EVROPSKIM DRŽAVAMA

Sažetak

Rad pruža sveobuhvatan pregled raznolikih formi vrhovnih sudova širom Evrope, nudeći uvid u različite strukture i funkcije koje oni predstavljaju u različitim zemljama. Analizirani su vrhovni sudovi kao jedina vrhovna sudska institucija ili kao deo šireg sistema vrhovnih sudova pored vrhovnog upravnog suda i/ili ustavnih sudova.

Rad naglašava raznolikost u organizaciji vrhovnog pravosuđa i nudi uvid u širi projekat uporednog vrhovnog pravosuđa, ukazujući na dubinsku analizu različitih faktora kao što su položaj vrhovnih sudova u različitim državama, proces izbora sudija i nadležnosti sudova u evropskim razmerama. Predstavljen je uvid u složenu i višestruku prirodu vrhovnih sudova u Evropi. Predstavljanje konkretnih primera omogućava dublje razumevanje teme, čineći je korisnim izvorom za čitaoce zainteresovane za uporedne pravne sisteme i pravosudne strukture u različitim zemljama.

U radu je identifikovan uticaj modela filtera na obim posla i efikasnost suda, kao i na strukturu vrhovnog suda. Nadalje, upućuje se na moguće nedostatke modela filtera i jurisprudenciju Evropskog suda za ljudska prava u tom pogledu.

Ključne reči: vrhovni sud, uporedne jurisdikcije, ujednačavanje sudske prakse, filter i kriterijumi prihvatljivosti.

1. Introduction

There is no international standard governing the organization and competence of a supreme court, as the highest judicial authority within a country's legal system (Bravo-Hurtado, van Rhee, 2021, p. 4). Efforts are being made on the regional level to address this issue. The Consultative Council of European Judges (CCJE) recognized that the primary role of the supreme court is to resolve conflicts in case law and to ensure consistent and uniform applications of law.¹ The same approach is confirmed in the jurisprudence of the European Court of Human Rights (ECtHR) that has recognized that supreme court must ensure

¹ CCJE Opinion, No. 20 on the role of courts with respect to uniform application of the law, 2017.

uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system.² Furthermore, the ECtHR in the *Hutchinson* case recalls that progressive interpretation of the law through judicial interpretation is embedded in the European legal tradition (Feteris, 2017, p. 156).³ In some countries of a civil law tradition, certain judgments of the supreme court, usually sitting as a grand chamber, are binding for all courts or for all panels of the supreme court.

The practice in Europe regarding organization and competences of supreme courts varies. It includes supreme courts as last instance courts which are established as Cassation, revision, or appeal model⁴ (Bobek, 2009, p. 36), in some countries a supreme court acts as a constitutional court (i.e., Estonia). In several jurisdictions the additional role of the supreme court is to perform role of the judicial council (i.e., first instance disciplinary proceeding) and is responsible for administration of justice (i.e., Estonia) or acting as judicial training institution (i.e., Cyprus).⁵

The article deliberately excludes various functions that supreme courts can fill, such as rendering advisory opinions in the legislative process, issuing preliminary rulings, deciding cases initiated by public bodies for the development of law, and focus on appeals filed by individuals (Galič, 2019, p. 45). This function of the supreme court is linked with the discussion of public and private purposes of the supreme court. An appeal filed to the supreme court serves both private interest of individuals seeking case reconsideration and public interest to the oversight of lower courts and unification of case law as part of the rule of law requirements. To foster the rule of law, there is a need for guarantees that similar cases are judged based on consistent legal criteria (Lindblom, 2000, p. 333).

Comparator jurisdictions are selected based on several criteria, such as the size of country and competence of the supreme court, with the focus on civil law countries. Additionally, countries included in the analysis are those which passed transition and became members of the EU (i.e., Estonia) as well as countries with longer democratic tradition (i.e., France, Italy, Finland, Sweden). Scandinavian countries

² Albu and others v. Romania, Application No. 34796/09, 12 May 2012.

³ Hutchinson v. United Kingdom, Application No. 57592/08, 17 January 2017, para 24.

⁴ Cassation model, represented by the French Court of Cassation, reviews lower court decisions for legal errors, ensuring correct application of the law. The revision model, applicable in Germany and Austria, involves comprehensive review of law, allowing the Supreme Court to reassess the case in its entirety. Reforms over the last few decades allow assessment of facts in both revision and cassation model. Appeal model, present in common law countries, is also found in the Scandinavian type of procedure, represents third appeal, and enables review of factual issues.

⁵ See https://e-justice.europa.eu/406/EN/judiciary_training_providers

are also included in the analysis, although the supreme courts there through the reforms have been transformed almost to the precedent courts similar to those in common law countries (Ghavanini, Grendstad, & Schaffer, 2023, p. 790).

2. Competences of Supreme Courts across Europe

Supreme courts, as courts situated at the top of the judicial hierarchy issuing final decisions at the domestic level, serve various purposes (Muller & Richards, 2010, p. 5). The vital role of supreme courts is in upholding the rule of law standards, specifically in ensuring the equal application of the law to all individuals. Supreme courts should ideally provide guidance in interpreting the law, addressing ambiguities and loopholes. Furthermore, they are expected to adapt legal criteria to contemporary circumstances, thereby contributing to the evolution of legal principles (Feteris, 2017, p. 157). The significance of supreme court rulings is in enhancing legal certainty. By providing clear interoperation and resolutions, supreme courts contribute to a well-functioning justice system, maintaining consistency and predictability in legal proceedings, and thus fostering a sense of fairness and justice, reinforcing the rule of law within a society.

Appeals to the supreme court are intended to focus on erroneous decisions made by lower courts. However, it highlights a common tendency among litigants to view unfavorable judgments as mistakes that should be rectified on appeal. Consequently, supreme courts might experience an increase in their caseload if there are no appropriate filters in place to manage access to the court. An example of this is the Court of Cassation in France, which during the 1990s was overloaded with cases, receiving more than 20,000 cases. To overcome the challenge, a new access filter was introduced in 2001 and cassation complain should raise a serious point of law to be admissible (Jeuland, 2021, p. 25). Similar challenges in the increasing of workload are recognized in Serbia. The Serbian Supreme Court was faced with the high demand and trend of increasing number of incoming cases over the last five years, from 13,838 cases in 2018 to 34,381 cases in 2022, which resulted in the increasing of pending stock (24,401 pending cases at the end of 2022).⁶

In a comparative perspective, supreme courts with more than 100 judges that deliver several thousands of judgments, can provide control over the decision of lower judges, but increase dramatically the risk of inconsistencies and

⁶ Supreme Court of Serbia (2023) Annual Report on the Work of the Courts in the Republic of Serbia for 2022, p. 18, 23. See https://www.vk.sud.rs/sites/default/files/attachments/ANNUAL%20REPORT%20ON%20THE%20WORK%20OF%20THE%20COURTS%20IN%20THE%20REPUBLIC%20OF%20SERBIA%20FOR%202022_0.pdf (5. 2. 2024)

eliminate the ability to manage unification of case law (Bravo-Hurtado, 2014, p. 328). That situation is in Italy, where the high volume of cases at the Court of Cassation (around 90,000 over the last decade) makes difficult to ensure legal consistency (Espositio, Lanau & Pompe, 2014, p. 7). Thus, The Court has acted more like a court of third instance, than as a judicial institution responsible for uniform interpretation of the law (Ferraris, 2021, p. 39).

By strategically selecting cases to rule on, supreme courts can influence the development of a consistent and predictable legal framework within their jurisdiction. The intentional setting of standards contributes significantly to the evolution and interpretation of the law in civil law countries. Therefore, in these cases, already one judgment of a supreme court, when it was reached with intention to set a precedent, can count as an authoritative case law.⁷

Venice Commission recognizes that the cassation procedure has as one of its main goals to guarantee and bring about uniformity of case law.⁸ Although there is internal judicial independence, the lower courts in civil law countries often adhere to principles established by higher courts to avoid having their decisions overturned on appeal. The Venice Commission suggests that while ensuring the uniformity of case law is crucial, the admissibility criterion should not be extended to empower supreme court to provide general recommendations and/or explanations on the application of legislation to lower courts.

The fundamental role of supreme courts as cassation courts is to supervise the legality and correct application of the law in decisions made by lower courts. In this function, the supreme courts do not assess the merits of the case, but invalidate decisions made by lower courts. From the perspective of the European Court of Human Rights, the supreme courts need to exercise effective control over the decisions of the lower courts. The effective control refers to the efficiency and efficacy of the control mechanism, aligning with the standards set by the European Convention on Human Rights. Requirement to exhausting national judicial avenues before resorting to the European Court of Human Rights (Art. 35 of the European Convention on Human Rights) ensures that cases brought have already undergone a thorough review within the domestic legal system, promoting the principle of subsidiarity and allowing national courts, including supreme courts, to address human rights issues in the first instance.

⁷ CCJE Opinion, No. 20 on the role of courts with respect to uniform application of the law, 2017, para. 14.

⁸ CDL-AD (2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, paras. 33, 34.

3. Admissibility Criteria in Comparator Jurisdictions

To achieve the role of supreme court to serve public purposes it is necessary to focus on several issues and take a balanced approach that includes increasing the capacities of the supreme court to ensure unification of court practice and reducing the number of cases (Jolowicz, 2000, p. 328). In comparative legal studies the significant attention has been put on access filters, especially concerning the reduction of cases brought before supreme courts. Access filters refer to mechanisms and criteria put in place to ensure that only the most pertinent and significant cases are heard.

Access filters often involve specific criteria that determine which cases can reach the supreme court. These criteria are designed to prioritize cases with legal significance, complex issues, or matters of public importance. These criteria serve as gatekeepers, allowing only cases meeting specific criteria to reach the supreme court, ensuring that the court's attention is focused on matters of significant legal importance. The criteria should be designed to aid the supreme court in fulfilling its role of promoting a consistent and uniform interpretation of the law.⁹ Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes. Spanish authorities tried to limit burden to the Supreme Court by introducing threshold in 1984, and increasing it in 1992, however the number of cassation appeals doubled despite these measures (de Benito, 2021, p. 56). Similarly, in Serbia the threshold for the revision is set to 40,000 euro (100,000 euro for commercial cases),¹⁰ however that limitation did not prevent increase of the Supreme Court workload. The proposed amendments to the Civil Procedure Code envisaged removal of threshold and increased focus on legal certainty and unification of case law through 'special revision' (Pavlović & Ignjatović, 2023, p. 7). If the proposed amendments are to be adopted, it will significantly limit competence of the Supreme Court of Serbia and have influence on the Court workload.

The procedure through which cases are filtered involves reviewing cases to determine their suitability for Supreme Court review. The method of filtering can vary and may include assessments of legal merit, relevance, or potential impact on legal precedents. In relation to the competent authority, access filters can be

⁹ See Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (Art. 7 (c)): "Appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law, or which would contribute to the uniform interpretation of the law."

¹⁰ Arts. 403 and 485, Civil Procedure Code, *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], Nos. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020, 10/2023.

implemented by either the lower court that issued the judgment, the supreme court itself, or both courts collaboratively. In Italy, the screening of all petitions is carried out by the specialized Filter Chamber (Art. 67 bis of the Law on Judiciary).¹¹ The choice of screening authority can influence the effectiveness and consistency of the filtering process.

Alternative solutions to reduce the caseload of the supreme courts include increasing court fees, regulating which lawyers are authorized to represent clients before the supreme court, implementing provisional enforcement of lower court judgments, eliminating oral hearing for certain cases, or creating different tracks for different types of cases. These measures aim to streamline the legal process and manage the workload more effectively. For example, in Germany, in line with Art. 78(1)(3) ZPO (Civil Procedure Law) the parties must be represented by an attorney admitted to practice before the Federal Supreme Court. Currently, only 42 attorneys are admitted (Stürner, 2021, p. 78).

The three primary models of the filtering mechanism are applied in Europe: the leave to appeal system, no judicial filtration and mixed model. These models determine how cases are selected and admitted to supreme courts in various European countries.

In the leave to appeal system, cases are pre-selected based on specific criteria before they are allowed to proceed to the supreme court. The selection criteria often include factors like matters of general importance or interests of justice. Countries like the United Kingdom, Ireland, Norway, Denmark, and Sweden follow the leave to appeal system. The decision to grant permission to appeal is at the discretion of the Supreme Court, and sometimes with lower courts of appeal, which may consider the significance of the case in terms of legal principles or public interest. In Denmark, for example, cases are selected by an Appeals Permission Board comprising judges, lawyers, and legal scholars (Tamm, 2011, p. 6). Notably, there is usually no mandatory requirement for legal representation before the supreme court under this system. Additionally, the supreme court can address both questions of law and facts, and selection criteria are often similar for criminal and civil cases, with the likely unlawfulness of the appealed decision not playing a significant role in the selection process.

The leave to appeal system allows the supreme court significant discretion in choosing cases, focusing on those with broader legal importance or implications, contributing to the court's role in shaping legal principles and ensuring uniformity in interpretation.

In the no judicial filtration model there is no pre-screening of case before they reach the higher court. Cases can be directly appealed to the supreme court

¹¹ Law No. 197 of 25 October 2016.

without prior selection or approval. Examples of this model are applied in France, Belgium, the Netherlands, Greece, and Italy. This approach allows a broader range of cases to be considered by the higher court without filtering based on specific criteria. Some countries may opt for this system to ensure unrestricted access to justice and avoid potential biases in the case selection process. Within this model, two basic approaches could be distinguished: private, extra judicial, and disguised leave to appeal. In the private, extra judicial filtration, cassation appeals to the supreme court in specific categories of cases can only be filed by a specific lawyer assigned to the supreme court or a lawyer meeting certain experience requirement (van Rhee, 2004, p. 7). The disguised leave to appeal approach functions similarly to a leave to appeal system but is not a filter in the true sense. Under this regime, the supreme court assesses the merits of the case after it has entered the legal process. The court can dismiss specific categories of appeals, such as those deemed manifestly ill-founded, using a simplified procedure.

The mixed model combines elements of both the leave to appeal system and the no judicial filtration approach. Certain cases may be subject to pre-selection based on specific criteria, while others are allowed to proceed without prior screening. This hybrid approach aims to balance the need for filtering important cases with the desire to maintain accessible justice for wider range of legal matters. The mixed system can vary in its implementation, with different variations present in different jurisdictions: appeals to the supreme court are required to be filed by sworn advocate or specialized lawyers, adversarial selection procedure, authority to grant leave to appeal rests with an appellate court, the legislator defines specific grounds that appeals must comply with to be admitted for a full examination and adjudication by the supreme court. In Germany, for example, the Court of Appeal selects cases to be sent to the Supreme Court (Stürner, 2021, p. 75).

There are countries where the motion to grant leave to appeal and the filing of appeal are treated as separate processes. This separation underscores a crucial point: the criteria for granting leave to appeal can be different from the question of whether the judgment being appealed is correct or not on points of law. In this context, the process of granting leave to appeal involves a preliminary assessment by the court to determine whether the case meets specific criteria defined by the law. On the other hand, filing the appeal involves the actual submission of the case to the higher court for a detailed examination of the legal points raised. During this stage, the higher court assesses the merits of the case, considering the specific legal arguments and whether the lower court judgment was correct or erroneous based on the applicable points of law (Galič, 2014, p. 292).

Typically, once an appeal is deemed inadmissible by the supreme court, the decision is final and cannot be further appealed.

3.1. Access to Court and Filtration Model

In a legal system where the constitution holds supreme authority, granting anyone the right to have their case heard and adjudicated by the supreme court becomes a constitutional guarantee. Attempting to limit or restrict this right by introducing filters or mechanisms to control appeals could lead to complications and face opposition, especially if it conflicts with constitutional guarantees. Furthermore, the challenges are posed by the national Constitutional Court or the European Court of Human Rights. These institutions often use test of proportionality. The principle of proportionality requires that any restrictions placed on these rights must be reasonable and in proportion to the aim sought to be achieved (Trykhlí, 2020, p. 128). Assessing limitations in this manner ensures that the fundamental rights and freedoms of individuals are protected, even in the face of attempts to introduce filters of restrictions on the right to appeal to the supreme court.

The right to appeal to the supreme court is sometimes recognized as a constitutional right. Some constitutions specify this right in general terms without specifying a particular court level, while other, like Estonia, expressly state the right to appeal judgments of court of first instance to a higher court. Also, the Italian Constitution, Art. 111(7), states that the final appeal against judgments is always admitted. In certain countries, like Belgium, Sweden, Austria and Estonia, the legislator is responsible for defining the scope of appeals to the supreme court. The extent of this right is determined through legislative measures rather than constitutional provisions. Constitutional courts in various countries, including Hungary, Czech Republic, Poland, and Armenia, have played a crucial role in interpreting, and safeguarding the constitutional right to appeal. These courts have declared certain rules related to the functioning of the supreme court unconstitutional, particularly those limiting the right to appeal or imposing specific criteria for case selection.

The intensity of addressing and regulating the right to appeal to the supreme court in the constitutional text does not necessarily correlate with the dynamic interventions of constitutional courts. Some countries recognize the right to appeal in their constitutions without specifying details.

There are differences in the approach to the right to appeal to the supreme court in European countries, particularly in comparison to the United States. Unlike the US Supreme Court, where there is not an inherent right to appeal, European countries generally recognize the right to appeal, which is considered a fundamental aspect of the right to a fair trial and access to justice. Rules governing the filtering of appeals to the supreme court in countries like the United Kingdom, Ireland,

Sweden, Norway, and Denmark share some similarities with the discretionally system of the US. In European countries, the discourse on the right to appeal to the supreme court is framed as a matter of personal right, emphasizing the importance of substantiating any addition restriction on the right.

According to Art. 6 para. 1 of the European Convention on Human Rights, individuals have a fundamental right to access to the courts, including supreme courts.¹² While limitations on this right are permissible,¹³ they must be proportionate and pursue a legitimate aim.¹⁴ The condition that determines whether an appeal is admissible, such as the legal requirements for lodging an appeal or the grounds on which it can be accepted, are regarded as a matter of domestic regulations.¹⁵ States enjoy a certain margin of appreciation in setting and applying these conditions. Namely, individual states have some discretion in determining the specific rules and requirements for appeals within their legal systems. These restrictions should not impair the essence of the right. The case *Henrioud v. France*,¹⁶ where the European Court of Human Rights found that the applicant had been deprived of the right of access to a tribunal because the Court of Cassation of France had been excessively formalistic in declaring the appeal on points of law inadmissible. This case illustrates the importance of ensuring that formalities do not obstruct the fundamental right to appeal and access justice. Considering the fundamental nature of the right to appeal, such discretionary systems may face scrutiny considering principles outlined in the European Convention on Human Rights.

The complexity and nuances surrounding the exhaustion of domestic remedies, specifically concerning appeals on points of law and the discretion of supreme courts have been interpreted by the European Court of Human Rights. The ECtHR recognizes that an appeal on points of law, for which leave is granted at the discretion of the supreme court, might not be considered an effective remedy that needs to be exhausted before approaching the ECtHR.¹⁷ This recognition suggests that applicants might not be obliged to pursue such discretionary appeals before the domestic supreme court before lodging a complaint with the ECtHR.

It should be emphasized that ECtHR has recognized that its role is not to assess whether the applicant should have been granted leave to appeal. This role is primarily a matter of national law and domestic courts. Instead, the ECtHR's

¹² *Platakou v. Greece*, Application No. 38460/97, 11 January 2001, para. 35.

¹³ *Golder v. the United Kingdom*, Application No. 4451/70, 21 February 1975, para. 38.

¹⁴ *Ashingdane v. the United Kingdom*, Application No. 8225/78, 28 May 1985, para. 57.

¹⁵ *Luordo v. Italy*, Application No. 32190/96, 17 July 2003, para. 85; *Levages Prestations Services v. France*, Application No. 21920/93, 23 October 1996, para 40.

¹⁶ *Heanrioud v. France*, Application No. 21444/11, 5 November 2015, paras. 73-75.

¹⁷ *Běleš and Others v. the Czech Republic*, Application No. 47273/99, para. 68.

task is to determine whether the proceedings as a whole, including availability and fairness of remedies, have been conducted in a manner consistent with the requirements of the European Convention on Human Rights.¹⁸

Furthermore, the limited reasoning by supreme courts in case of rejecting cases due to insufficient legal grounds, might satisfy the requirements of Art. 6 of the Convention. The ECtHR acknowledges that supreme court can refuse cases without detailed explanations, and such decisions may still conform to the Convention's requirements.¹⁹ The evaluations occur within the context of the overall fairness of the legal proceedings.

4. Structure of the Supreme Court in Comparator Jurisdictions

The structure of the supreme court varies across countries, however there are some similarities. Supreme courts across Europe have at least two chambers, a civil case chamber and a criminal case chamber and significant role of judicial assistants, researchers or clerks who support work of judges. Bigger courts have more chambers. In France, for example, Court of Cassation has five civil chambers: the Commercial Chamber, the Labor Chamber, the Chamber for international litigations, arbitration and personal rights of private law and family matters, the Chamber with procedural law and social security issues, and the Chamber with real estate issues (Jeuland, 2021, p. 23). The Court of Cassation in Spain also has five chambers: Civic, Criminal, Administrative, Labor and Military (de Benito, 2021, p. 62).

Smaller supreme courts consist of up to 20 judges. For example, the Supreme Court of Estonia has 19 judges who administer justice in one of four chambers: the Civic Chamber, the Criminal Chamber, the Administrative Law Chamber, and the Constitutional Review Chamber.²⁰ In Sweden, the Supreme Court is composed of 16 judges and divided into two divisions,²¹ while in Finland it has 19 judges, 18 in Denmark and 20 in Norway. Only in Denmark the precise number of judges is stipulated, while in Sweden and Norway only minimum number of judges is determined by law (Ghavanini, Grendstad & Schaffer, 2023, 784).

Supreme Courts with lower number of judges usually have strong expert support structure. In Sweden some 90 people work at the Supreme Court, most

¹⁸ *Kukkonen v. Finland (no. 2)*, Application No. 47628/06, 13 January 2009, para. 25.

¹⁹ *Nerva and Others v. the United Kingdom (dec.)*, Application No. 42295/98, 24 September 2002, para. 25.

²⁰ See <https://www.riigikohus.ee/en/chambers> (5.2.2024)

²¹ See <https://www.domstol.se/en/supreme-court/justices/> (5.2.2024)

of them being lawyers. In Norway a legal researcher has to prepare case memo within two weeks' time the appeal was registered at the Supreme Court.²² A similar role is assigned to legal assistants in Lithuania.²³ They first screen all incoming appeals. In fact, it may be inevitable for a court to vest judicial assistants or legal researchers with more tasks in filtering appeals, if a judge is overwhelmed with a significant number of cases, the judge has to adjudicate on full merits and by providing detailed reasoning. Filtering of appeals may be treated as less demanding and simpler task for which there is not enough time available for a judge to read and carefully analyze every incoming appeal. On the other hand, marginalization of filtering of appeals can have direct negative effect on adjudication of cases on the merits, because cases that are not suitable for the functions and purposes of the supreme court can indeed be selected. In Estonia, judges of the Supreme Court are assisted in the preparation and review of cases by law clerks, consultants, and secretaries. A law clerk must meet the educational requirements for a judge. The term of office of a law clerk is three years and may be extended. In Finland, referendaries of the Supreme Court prepare cases for the court and present them in hearings. The referendaries also have primary responsibility for communication with the parties to cases and for administrative work relating to the hearings. The referendaries (between 25 and 30) are appointed by the Plenary Session of the Court, and are experienced lawyers specialized in various branches of law.

In Sweden judges are supported by judge referees and drafting law clerks.²⁴ Judge referees are responsible for preparing and presenting cases. They present judicial enquiries and legal assessments of appeals and applications. To help the one or more justices of the Supreme Court deciding these, they also submit reasoned, draft solutions. Since 2016, the Supreme Court has also had drafting law clerks. This has refined the judge referee role to primarily dealing with cases that will set precedents or are otherwise more complex than usual. Judge referees are normally associate judges who have been trained for positions as judges.

On the contrary, in France and Italy, supreme courts have high number of judges. In French Court of Cassation there are 115 senior judges, 60 junior judges and 20 law clerks (Jeuland, 2021, p. 25), while in Italy there are more than 300 judges in the Court of Cassation.²⁵ According to the CEPEJ data around 5 percent of all judges are appointed to the supreme instance.

²² See <https://www.domstol.no/en/supremecourt/about/employees/> (5.2.2024)

²³ See <https://www.lat.lt/en/general-information/about-the-court/95> (5.2.2024)

²⁴ See <https://www.domstol.se/en/supreme-court/>

²⁵ CEPEJ (2022) European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation Cycle.

Although, the Supreme Court in Serbia has high volume of cases, the number of judges is significantly lower than in comparator jurisdictions. In 2022, Supreme Court in Serbia had 34,381 incoming cases and 32 judges who effectively worked on cases.²⁶

Besides the professions directly involved in processing of cases, supreme courts also have personnel working with administration and services. For example, Supreme Court of Estonia has six supporting departments: the General Department, the Personnel Department, the Assets Management Department, the Communications Department, the Information Technology Department and the Legal Information and Judicial Training Department. In addition, the Director, the Legal Adviser to Chief Justice, the Financial Manager, and the Data Protection Specialist – Archivist work at the Supreme Court of Estonia.²⁷ Structure of the administration and services depends on the competences of the Supreme Court, especially beyond adjudication.

The structure of supreme courts is evolving in the context of the growing importance of international jurisprudence and case law (Uzelac, 2019, p. 127). The supreme courts need to monitor not only their own case law but also to follow relevant rulings from supranational courts, such as European Court of Human Rights and EU Court of Justice. To meet the demand, the supreme courts are required to establish adequate services, expand staff, and organize units dedicated to legal research. In the EU member states, the supreme courts must enhance their capacity and structures for referencing and engaging in dialogue with international judicial institutions, particularly in the interpretation of legal instruments like EU law and cases related to human rights violations. Importance of clerks for the supreme court performance could be seen from the requirement that exist in Sweden, where clerks need to have legal education and specialization in specific area of law and could be asked to take part in judgments (Ghavanini, Grendstad & Schaffer, 2023, p. 793). While most supreme courts have existing staff or departments for legal research, the rising importance of international jurisprudence necessitates restructuring and reinforcement of these departments. The organization and method of work within supreme courts might change, emphasizing the importance of legal research and analysis in the fields of international and comparative law. The good example could be the German Federal Supreme Court that has made significant structural adjustments, employing numerous scientific assistants to support judges in their work, utilizing extensive court libraries. Furthermore, many supreme courts in the EU are

²⁶ Supreme Court of Serbia (2023) Annual Report on the Work of the Courts in the Republic of Serbia for 2022, pp. 9 and 18.

²⁷ See <https://www.riigikohus.ee/en/administration> (5.2.2024)

using comparative law analysis to get inspiration and produce additional arguments to strengthen own decisions (Feteris, 2021, p. 15).

Furthermore, the trend where supreme courts are increasingly becoming involved in decision-making processes that extend beyond strictly judiciary matters necessitate organizational adjustments. Instead, the supreme courts are addressing issues that impact the functioning of the national judiciary and have broader implications for the administration of justice. One specific example is active engagement of supreme courts in tackling delays and backlog within the national judiciary system. For example, in Serbia, the Supreme Court initiated a project in 2014 aimed at reducing old cases. This initiative, known as the National Backlog Reduction Program, demonstrates the Supreme Court's proactive involvement in addressing a systematic issue within the country's judiciary (World Bank, 2021, p. 76. Similar initiative was launched in Croatia in 2005.²⁸ To ensure the necessary capacities for undertaking these tasks of administration of justice, the supreme courts create special judicial units dedicated to expediting applications, the involvement of law clerks, or the temporary assignment of judges from lower courts. Additionally, specialized departments may be established to manage statistics related to time management in lower courts.

5. Criteria for the Selection of Judges in Comparator Jurisdictions

The Venice Commission recognized that provision on the appointment of supreme court judges is the only exception from a closed judicial career.²⁹ Furthermore, the composition of both the Supreme Court and the Constitutional Court should include judges with expertise in human rights.³⁰ The Venice Commission considers that election and release from duty of the President of the Supreme Court by the Judicial Council should be retained.³¹

In most European countries vacancies at the supreme court are publicly advertised. Open positions are placed on official websites either of the supreme court or the ministry of justice (Hurley, 2022, p. 11). Quite often, this is

²⁸ See https://www.vsrh.hr/CustomPages/Static/HRV/Files/2016dok/izvjesce_predsjednika_o_stanju_sudbene_vlasti_2015.pdf (5. 2. 2024)

²⁹ CDL-AD (2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, para 53.

³⁰ CDL (1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, §32.

³¹ CDL-AD (2012)024, Opinion on two set of Draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, para 17.

accompanied by an announcement in an official gazette and/or a central newspaper or journal. In Sweden, vacancies for judges of the Supreme Court are advertised on the Swedish Courts website.

In European countries, the criteria a candidate has to meet are written down by law. Some national rulings provide even a very detailed list of conditions, whereas most countries only indicate some formal aspects. Generally, the applicants must have a law degree from a university and must have passed a special professional law examination. Several countries state a minimum of age, which is between 30 and 45 years, others request a minimum of legal experience differing from 5 to 15 years.

In many European countries one does not necessarily have to be a member of the judiciary to become a judge of the supreme court. Judgeships are especially also open to university professors, in most cases also to lawyers, prosecutors and members of the administrative service. In Finland, the judges of the Supreme Court have experience in different branches of the legal profession, most often in courts of law, but also in the drafting of legislation, in academic positions, and as legal practitioners. The Danish Supreme Court is an example of initiative to bring in individuals with broader professional experiences and reflects a commitment to diversity and a recognition of the value of varied perspectives on the bench (Tamm, 2011, p. 5). This approach may contribute to a more well-rounded and versatile judiciary, enhancing the Supreme Court's ability to address a wide range of legal issues.

Across Europe there are an enormous variety of selection and nomination procedures. Several entities with a variety of functions and different scopes of influence can be involved in the selection of candidates or even appointment. In Serbia, judges of the Supreme Court are professionals, appointed by the High Judicial Council from the pool of career judges.³² In other countries where judicial council has a role, very often, a special election committee or the council of the judiciary draws up a list of candidates. In most countries, the proposal of the council is binding, or if it is not formally binding it is at least expected to be followed. It is quite uncommon that the election committee or the judicial council is restricted to an advisory role. In Denmark, Norway, and Sweden in order to limit the role of the ministry of justice the special judicial appointment boards were established to select candidates for the judicial function in the supreme court (Ghavanini, Grendstad & Schaffer, 2023, p. 785). Composition of the boards in all three countries is mixed, consisting of judges, lawyers in other professions and representatives of the population. Only in Sweden, judges have majority in the Board (5 out of 9).

³² Art. 17, Zakon o Visokom savetu sudstva [Law on High Judicial Council], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 10/2023.

The main criterion to be drawn up is qualification, which is usually verified based on references, in many countries followed by a hearing before the selection organ, and in Sweden candidates have to pass the psychological test (Ghavanini, Grendstad & Schaffer, 2023, p. 786). Other common criteria to the selection process are seniority, publications, and promotion level. In Sweden, applicant must satisfy particularly stringent requirement in respect of legal knowledge, powers of analysis, written and verbal expression, judgment, and independence.

Tenure of the supreme court judges across Europe is permanent and they are obliged to leave position at the mandatory retirement age. In Serbia, the mandatory retirement is at age of 67 for the Supreme Court.³³

6. Financial Independence of the Supreme Court in Comparator Jurisdictions

The financial independence of judiciary seems to be one of the main conditions of its institutional independence as *de facto* judicial independence (Hayo & Voigt, 2023, p. 3). The Basic Principles on the Independence of the Judiciary from 1985 as well as the 1989 Rules for the Effective Application of the Basic Principles envisaged member states duty to provide 'adequate resources' for proper functioning of the judiciary. Thus, financial independence of a supreme court is a fundamental element in upholding democratic principles of separation of powers.

Supreme courts across Europe have varying degrees of financial independence.³⁴ The financial independence is lacking in countries where the supreme court does not have its own funds, since without control over its funds, the supreme court cannot autonomously determine the use of resources necessary for its operations. There are countries where funds are limited in the scope, like in France, Slovenia, and Lithuania. In these countries, certain property investments, such as those above a threshold or specific construction projects, may be governed by the ministry of justice. Another example is when budget is managed on behalf of the supreme court by an independent judicial authority, like it is in Denmark (Danish Court Administration), Ireland (Court Service) and Norway (National Courts Administration). Having in mind that purpose of the judicial councils is to protect independence of the judiciary, this approach does not jeopardize independence of the supreme court (Matić Bošković & Nenadić, 2018, p. 44).

³³ Art. 66, Zakon o sudijama [Law on Judges], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 10/2023.

³⁴ More on financial independence of the supreme court in Newsletter No. 23, Network of the Presidents of the Supreme Judicial Courts of the European Union, December 2011.

In countries in which a supreme court has its own funds, majority of budget is spent on salaries, having in mind budget structure and expenditures. Judges' remuneration is part of judicial independence and should be sufficient to preserve it.³⁵

The president of a supreme court has the central role in managing the budget, with variations across the comparator jurisdictions in the degree of financial powers and the possibility of delegation. In some countries the president's authority in management of the budget may be restricted or subject to additional approvals. For example, in Austria, President may only authorize certain expenses, depending on their nature or amount, after obtaining consent of the Minister of Justice.

Financial management of a supreme court fails under the budgetary controls, both preventive and a posteriori. The German Supreme Court has preventive warning system that involves an automated monitoring software program, which signals when amount exceeds the allocated resources. A posteriori controls may be conducted by specialized bodies like court of auditors, treasury, parliament. In some countries the control is conducted by the ministry of justice (Finland), or independent judicial authority (National Courts Administration in Norway).

7. Conclusions

The comparative analysis shows that there is no solution that fits all countries across Europe. The system that provides good results in one country is dependent on too many variables. The Supreme Court in Serbia is faced with the increase workload and more than a decade of trend of increase in incoming cases. As a result, the pending stock is also increasing and jeopardizes efficiency of the Supreme Court and the right to a fair trial. The comparative examples could provide important insight on success of reforms related to the limitation of access to the Supreme Court.

It should be highlighted that the reforms restricting access to the supreme court have faced criticism. The concern is that reduced access may undermine the protection of uniformity. However, the article recognized that supreme courts with huge volume of cases are facing the challenges to ensure uniformity of case law. Thus, it is important to find balance between access to the supreme court and the need to unify the case law.

³⁵ European Network for Council of Judiciary (2016) Funding of the Judiciary – Summary of international and ENCJ resources, Annex I to the ENCJ Report 2015-2016, p. 6.

In relation to the structure of the supreme court, it is common for all jurisdictions to rely significantly on judicial assistance and expert staff and even to establish research units. Within the EU member states, the need to ensure application of the EU *acquis* and follow jurisprudence of the EU Court of Justice and European Court of Human Rights increases the need for legal research support. The reforms of the supreme court, especially in the transitional countries, should have this practice in mind and identify adequate solution for introduction of expert staff.

Related to the composition of the supreme court, most of the European countries have professional and career judges. However, the Scandinavian countries (Denmark) introduced mixed structure of the supreme court to enable appointment of the academics or legal practitioners that could bring new approach and vision.

Comparative analysis could bring information for the current judicial reform in Serbia and across Western Balkan region, as well as in Eastern Partner countries that aspire to the EU (Armenia, Georgia, Moldova, Ukraine).

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THE MODERN BREXIT AGENDA: SOME CONSEQUENCES OF “TAKE BACK CONTROL”

Summary

Brexit, the historically unique process of the UK's withdrawal from the European Union, has continued to dominate the global conversation for several years and its significance has not waned. The withdrawal of a state from the EU happened for the first time in more than half a century of its history. Despite the formal completion of Brexit, many related issues regarding the implementation of the EU-UK Withdrawal Agreement, the status of Northern Ireland, the implementation of the Trade and Cooperation Agreement between the two parties, the place of EU law in the British national legal order, are still not finally resolved. The adopted legal decisions influence the current development of both the EU and especially the UK's legal order. All this allows us to talk about the actual continuation of Brexit and the formation of its modern agenda.

Keywords: European Union, United Kingdom, Brexit, Northern Ireland, Withdrawal Agreement, Protocol on Ireland/Northern Ireland.

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MODERNA AGENDA BREGZITA: NEKE POSLEDICE “VRAĆANJA KONTROLE”

Sažetak

Pitanje Bregzita, istorijski jedinstvenog postupka povlačenja Velike Britanije iz Evropske unije, i danas, nekoliko godina nakon njegovog formalnog okončanja, predstavlja predmet diskusija na globalnom nivou, a značaj ovog pitanja i dalje je veliki. Povlačenje države iz članstva EU dogodilo se prvi put posle više od pola veka njene istorije. Uprkos formalnom okončanju Bregzita, brojna pitanja, kao što su pitanje implementacije Sporazuma o povlačenju i Sporazuma o trgovini i saradnji, pitanje statusa Severne Irske, kao i pitanje mesta prava EU u britanskom nacionalnom pravu, još uvek nisu konačno rešena. Usvojene pravne odluke utiču kako na trenutni razvoj prava Evropske unije, tako i na razvoj britanskog nacionalnog prava. Sve su to razlozi koji govore o važnosti teme, te opravdavaju bavljenje pitanjem faktičkog nastavka Bregzita, te formiranja njegove moderne agende.

Ključne reči: Evropska unija, Velika Britanija, Bregzit, Severna Irska, Sporazum o povlačenju, Protokol o Irskoj/Severnoj Irskoj.

1. Introduction

Whether the UK's withdrawal from the European Union is a tragic event for the EU or, conversely, an opportunity for further integration remains open. In our opinion, Brexit has revealed a new aspect of regional integration - its possible reversibility. It has shed light on the practical aspects of both integration and disintegration processes. At the same time, the modern doctrine has not developed proper theoretical foundations that solve the problem of successful development of integration, comprehensive involvement of Member States, prevention of reverse integration and prevention of disintegration.

Sovereignty issues played a key role in Brexit. The slogan “Take back control”, used by supporters of the UK's withdrawal from the EU, associated with the concept of “sovereignty” (Gammage & Syrpis, 2020), caused an emotional response from many, becoming a call for the restoration of what was lost. Nevertheless, “taking back control” encountered the practicalities of life in the UK following its departure from the European Union, an integration body consisting

of neighbouring European nations. Brexit seemed as an opportunity to get out of the power of the rules and mechanisms of the European Union.

For forty-seven years of Britain’s membership in the Union, EU institutions have often been the object of suspicion, criticism and hostility from the British political establishment and the media (Wind, 2017). The headlines of British newspapers have repeatedly claimed that in the international arena, the UK has been “pushed aside” by the EU’s supranational institutions.¹ In campaigns promoting the state’s withdrawal from the EU, it was stated that “EU judges have already repealed UK laws on issues such as counter-terrorism, migration, taxation and whether prisoners should be allowed to vote”, which, as it was said, amounted to “loss of control”.² Thus, Brexit has been of great legal importance, since it was necessary to sever existing legal, trade and political ties with the EU and to establish new relations.

2. Negotiating Brexit: Dynamics of “Take Back Control”

After the 2016 referendum, the scepticism about supranational institutions, in particular the role of the EU Court of Justice, has, unsurprisingly, become noticeable in the UK’s approach to withdrawal negotiations. The British government in 2017 indicated that one of the main goals of the exit negotiations was “to regain control over our laws and put an end to the jurisdiction of the European Court of Justice in the UK”³. British laws should “be interpreted by judges not in Luxembourg, but in courts across the country”⁴. The 2018 government White Paper confirmed that “withdrawal from EU institutions” corresponds to “restoring the sovereignty of the UK, ensuring that the laws by which people live are adopted by those they elect and enforced by the UK courts, with clear accountability to the people of the UK”⁵. Boris Johnson subsequently published a

¹ Boris Johnson dramatically rules himself out of Conservative election race. *The Telegraph*, 30 June 2016. Available at: www.telegraph.co.uk/news/2016/06/30/boris-johnson-dramtically-rules-himself-out-of-conservative-elec/ (July 1, 2023).

² *Vote Leave, Briefing: Taking back control from Brussels*. Available at: http://www.voteleave-takecontrol.org/briefing_control.html (1. 7. 2023).

³ *Prime Minister’s Office, The government’s negotiating objectives for exiting the EU: PM speech*, 17 January 2017. Available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pmspeech> (1. 7. 2023).

⁴ *Ibid.*

⁵ *HM Government White Paper: The Future Relationship between the United Kingdom and the European Union*, 12 July 2018. Available at: <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> (1. 7. 2023).

manifesto stressing that his government “will not allow the UK to join the single market, to any form of customs union and will put an end to the role of the EU Court of Justice”⁶.

On the part of the EU, the negotiating directives of May 2017 stated the need “to include in the Withdrawal Agreement effective mechanisms for ensuring compliance and dispute settlement that fully respect the autonomy of the Union and its rule of law, including the role of the Court of Justice, in order to guarantee the effective fulfilment of obligations under the Agreement” (Council of the European Union, 2017).

Regarding, in particular, the issues of further application of EU legislation, citizens’ rights and provisions relating to financial settlements with the UK, the negotiation directives emphasized that “the jurisdiction of the Court of Justice (and the supervisory role of the Commission) should be preserved” (Council of the European Union, 2017). The UK government responded by accusing the EU of “judicial imperialism” for demanding an overly prominent role of the EU Court in the Withdrawal Agreement (Herszenhorn, 2017).

It may be worth reminding here that the first British political documents concerning withdrawal from the Union were based on the initial idea that negotiations on the UK’s withdrawal and future partnership could be agreed simultaneously and, quite possibly, together in a single agreement. This parallel approach explains why the British government initially believed that Withdrawal Agreement could be compared to other international agreements concluded between the EU and third countries. Those agreements while providing for a “close” relationship, did not necessarily include the jurisdiction of the EU Court of Justice, for example, the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) or EU Free Trade Agreement with South Korea (UK Government, 2017a).

European institutions, however, imposed a step-by-step approach to Brexit negotiations and believed that the Withdrawal Agreement could only address a few essential issues to ensure an orderly exit, while future relations should be agreed and established in accordance with EU rules on concluding international treaties after the UK became a third country (European Council, 2017). Moreover, the purpose of the Union regarding the content of the Withdrawal Agreement was to preserve to the maximum extent possible the existing principles defined by EU law. Therefore, a few months into the negotiations, it became evident to the withdrawing state that if the EU and the UK were to reach an agreement on

⁶ *Get Brexit Done Unleash Britain’s Potential: The Conservative and Unionist Party Manifesto 2019*. Available at: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf (1. 7. 2023).

withdrawal, a significant portion of EU law would continue to apply to the UK as a third country. This would essentially treat the UK as if it were still a member state, in line with the principles of direct effect and supremacy. Faced with this scenario, the UK also acknowledged the need for a dispute resolution mechanism and proper oversight to ensure compliance with the Agreement resulting from the Brexit negotiations. Additionally, they recognized the necessity for certain restrictions on the Union’s ability to agree upon certain matters.

Autonomy is considered part of the very fundamental foundations of the Union’s legal order (Wessel & Blockmans, 2013, p. 10), since it affects the authority to determine the validity and interpretation of EU law as a self-sufficient and self-referential legal system, distinct and independent from international law (Eckes, 2020, p. 2). It is worth noting that the Court also referred to this principle in its recent Brexit-related *Wightman* case, stating that: “The autonomy of EU law with respect for both the law of Member states and international law is justified by the essential characteristics of the EU and its law relating, in particular, to the constitutional structure of the EU and its very nature” (EU Court of Justice, 2018). In the light of this principle underlying the debate about the very nature of EU law, and taking into account the need to conclude an Exit Agreement in accordance with Art 50 of the EU Treaty (Agreement, 2020), an international treaty between the EU and a member State that has become a third country, including effective mechanisms for law enforcement and dispute settlement, is of interest as a fundamental requirement for protecting the autonomy of the Union’s law by formulating clear restrictions for the process of leaving the EU.

Despite the red line on the termination of the jurisdiction of the EU Court on British territory, the UK proposed several models for resolving disputes between the two Parties in the Withdrawal Agreement. The UK acknowledged that in certain EU international agreements, if provisions similar to the pertinent Union regulations exist, Contracting Parties have the right to seek clarification from the EU Court regarding these rules. It is noteworthy that while some EU agreements grant this appeal privilege to an independent arbitration body rather than the parties involved, the UK still recognized the opportunity for such an application (UK Government, 2017b). Thus, the UK eventually agreed to what it designated as one of the most significant red lines: the dispute resolution mechanism agreed in the Withdrawal Agreement is undoubtedly one of the most integrative of the existing models developed by the EU to protect the Union’s rule of law. However, after a closer examination of the agreed dispute resolution mechanism, we may find that even this model, despite the parties’ efforts to comply with the principle of autonomy, may still face certain objections if ever brought before the Court.

3. Challenges of Northern Ireland

Issues related to Northern Ireland occupied one of the central places in the framework of Brexit. It was not about independence, but about the future legal regime of the border with the Republic of Ireland, which remained an EU member state. The problem was that the UK was leaving the Common Market, which provides for the functioning of a single customs space, which could potentially require tighter control over the border, fuelling contradictions between supporters and opponents of the idea of a united Ireland in Northern Ireland (Doyle & Connolly, 2017).

In fact, before Brexit, there was no border between the United Kingdom and the Republic of Ireland, because in 1923 passport control between the countries was abolished, and when the common market was created in 1993, customs control was eliminated. A common migration space was established between the countries, which regulated the residence rights of non-residents in both countries (Ryan, 2001). Restoring a full-fledged border was not part of the future plans of both London and Dublin. Initially, the problem was that if the border between Great Britain and Northern Ireland remained open, it would be almost impossible to restrict freedom of movement, which was advocated by both the British government and the EU (Keating, 2021). Ireland has remained a full-fledged member of the EU single internal market, and thus retains obligations to comply with all the principles of its functioning, including guaranteeing the free movement of citizens of the European Union.

Due to the special political significance, the solution of the Northern Ireland issue required separate attention and an acceptable solution. In addition, Northern Ireland received a significant share of subsidies from the EU, including the PEACE program funded from the Union funds, aimed at resolving the Northern Irish problem – the conflict in Ulster (O'Neill, 2018). After Brexit, these costs fell on the Government of the United Kingdom.

Although there was a level of consistency in the Protocol text during the negotiations, a new important element appeared in the final version of the document. This provision provided that Northern Ireland should be able to express its opinion on its new position, although it was not specified whether it would be a referendum, or whether the opinion would be expressed within the existing institutional structures. The idea was that if Northern Ireland was to remain within the framework of this new status, which provides for the harmonization of many rules with EU law, then some kind of consent mechanism was needed that would take into account the opinion of the residents of this region. The fact that Northern Ireland did not support the UK's withdrawal from the European Union at the referendum, and that

proposals to retain observer status for British members of the European Parliament were rejected, led some to doubt the authenticity of the desire to participate in the withdrawal process, as well as the degree of support for Brexit.

Ultimately, Art. 18 of the Protocol on Ireland/Northern Ireland has established a consent mechanism. Despite the importance of this democratic institution, nevertheless, there are good reasons to doubt the reasonableness of such a decision. Brexit crosses the line of ethno-national politics in Northern Ireland and is a highly moot issue. This process is poised to potentially become a recurring examination of the resilience of the power institutions in the vicinity. The way in which the Protocol is implemented in practice, as well as the progression of the UK and the EU post-Brexit, will determine the contextual narrative.

The mechanism, in particular, provides for an opportunity to verify democratic consent regarding the continuation of the application of Arts. 5-10 by the end of 2024 (Art. 18 of the Protocol). It is established that this should be done “strictly in accordance” with the British unilateral statement, which should set out the details of the process (UK Government, 2019). It is planned to conduct a vote of the members of the Northern Ireland Assembly, deciding on the outcome by majority vote.

This provision means that the Assembly has the right to authorize the continuation or termination of the application of the rules on the special status of the region by a simple majority vote. If the First Minister and his First Deputy do not submit the relevant petition within the established time frame, then the members of the Assembly receive the right to do so.

If the consent process cannot be implemented according to the procedure described above, then the UK has the right to initiate an alternative process. For example, this may happen in the case of non-functioning executive or legislative authorities of the region. In such situation, the voting will be organized by the British government, and the decision will be made by a majority of the votes of those present and participating in the voting.

Although a simple majority can either terminate or continue the special provisions in relation to Northern Ireland, the Protocol enshrines the principle of recognizing the importance of the existing intercommunal system in the region. According to para. 5 of Art. 18 of the Protocol, if the decision is taken by a simple majority, the special legal regime for Northern Ireland will continue to apply for the next four years, however, with intercommunal support for such a decision, the validity of these agreements increases to eight years. In addition, the UK is obliged to conduct consultations and independent verification if such intercommunal support cannot be achieved.⁷

⁷ Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’

At the same time, if, as a result of the vote, it is decided to terminate the application of the provisions relating to the special status of Northern Ireland, in accordance with para. 4 of Art. 18 of the Protocol, the Joint Committee must formulate recommendations within two years on what measures are necessary to, for example, avoid a hard border between the two parts of the island of Ireland. Given the debate surrounding the Protocol and its complexity, combined with the inability to establish any other reliable basis for achieving the agreed goals, it can be assumed that this time may not be enough.

It is difficult to predict the impact of the consent mechanism. The necessity of the decision is being questioned, alongside concerns about the potential repercussions it may have on the effectiveness and operations of regional authorities. These concerns also extend to its compliance with the Good Friday Agreement (Hayward, 2020). The future of the provisions on democratic consent may depend on how the practical implementation of the Protocol develops; how they will be perceived by a wide range of private actors, especially representatives of both confessional groups. Such issues may determine the fate of the provisions on democratic consent.

At the same time, a fundamental question remained in all iterations of the Protocol: how likely is that both sides will reach a “follow-up agreement” that meets the agreed goals related to the island of Ireland? This is important because it remains possible to conclude a subsequent agreement to replace the Protocol in full or in any part of it (Art. 13 of the Protocol). In the light of the UK’s desire to significantly move away from the EU in order to realize some of the ambitions and promises of Brexit, it can be assumed that the Protocol may stand the test of time and become a built-in agreement for Northern Ireland between the two parties. The parties struggled to reach an agreement for a long time, which underscores the difficulties of reaching new agreements if one party were to initiate them.

The UK government hailed the consent mechanism as a “fundamental element of the new agreement”⁸. More importantly, it allowed to declare that the “anti-democratic” support regime had been abolished. However, the largest Unionist party in Northern Ireland did not share government’s view/stance and continued to oppose the deal. Presenting party’s manifesto for the 2019 general election, unionist leaders stated that the differentiated agreement after Brexit for Northern

provision of the Protocol on Ireland/Northern Ireland. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf (1. 7. 2023).

⁸ Prime Minister’s Statement to the House of Commons of 19 October 2019. Available at: [https://hansard.parliament.uk/commons/2019-10-19/debates/8C3F5267-8186-4536-83EC-56E3C88DCC8E/PrimeMinister’s Statement](https://hansard.parliament.uk/commons/2019-10-19/debates/8C3F5267-8186-4536-83EC-56E3C88DCC8E/PrimeMinister’s%20Statement) (1. 7. 2023).

Ireland violates the principle of consent⁹ “because the continuation of the Protocol does not require the consent of the majority of unionists and nationalists” (Phinnemore, 2020). Obviously, the reason why “intercommunal support” was not considered necessary to preserve a differentiated agreement after Brexit for Northern Ireland was to ensure that neither Unionists nor nationalists would have the right to veto its further application. However, given the fact that the majority of voters in Northern Ireland voted for the UK and, consequently, the region to remain in the EU, the question arises whether there could be a more appropriate consent mechanism requiring “intercommunal support” for the region’s exit from the single market and customs union. However, since the conclusion of the Withdrawal Agreement, which includes the Protocol, the Unionists have made it clear that they will seek to annul this agreement. Such a statement of intent indicates the underestimated danger posed by the provisions of the Protocol, including the practice of using each international institution as another arena for political struggle (Özersay & Gürel, 2009, p. 273). The consent mechanism, despite being a welcome channel for democratic communication, could lead to another proxy war over a constitutional issue that divides the two main communities in Northern Ireland.

4. Implementation of the Protocol on Ireland/Northern Ireland

The Withdrawal Agreement (Agreement, 2020) uses the terms “implementation” and “application” as combined technical terms: the Joint Committee is responsible for implementation and application, and controls and facilitates both processes (Art. 164 of the Agreement). In the most general sense, application presupposes the existence of rules that are explicit and unconditional, while implementation requires that the rules are not self-applicable (Bradley, 2020).

A brief history of implementation of the Withdrawal Agreement is interspersed with cases of the UK’s refusal to comply with its terms (Galushko, 2022). In particular, in July 2021, the UK government called for a revision of the Protocol on Northern Ireland, arguing that it should be implemented differently.¹⁰ The need to amend the Protocol was indicated among others on the following issues:

⁹ Bain, M. 2019. Boris Johnson’s deal has breached the principle of consent: Arlene Foster. *Belfast Telegraph*, 29 November 2019. Available at: <https://www.belfasttelegraph.co.uk/news/politics/general-election-2019/boris-johnsons-deal-has-breached-the-principle-of-consent-arlene-foster-38736613.html> (July 1, 2023).

¹⁰ Northern Ireland Protocol: The Way Forward. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf (1. 7. 2023).

- customs procedures for the import of goods to Northern Ireland from the UK;
- sanitary and phytosanitary inspections and control of goods imported into Northern Ireland¹¹;
- regimes of trade in goods that were subject to grace periods, such as medicines, veterinary drugs;
- managing the implementation of the Protocol, which focuses on the jurisdiction of the EU Court of Justice as the final arbitrator in the event of disputes between the UK and the EU over the interpretation of EU legislation in accordance with the Protocol.

In March 2021, the UK government decided to unilaterally extend the grace periods in connection with the requirement to provide export certificates of conformity for all animal products and postal items imported into Northern Ireland from the UK, for which customs declarations are required.¹² In response, the European Commission initiated legal proceedings against the UK Government, which immediately requested a suspension of the trial and offered to renegotiate the Protocol, while the European Commission focused on attempts to improve the work of the Protocol in its current form.

In October 2021, the European Commission published four documents outlining proposals that should improve the implementation of the Protocol¹³. The submitted proposals related to the following aspects:

- sanitary and phytosanitary inspections;
- introduction of flexible customs formalities to facilitate trade in goods between the UK and Northern Ireland;
- enhanced engagement with Northern Ireland stakeholders on Protocol implementation;
- uninterrupted supply of medicines from the UK to Northern Ireland.

However, the Commission's proposals did not contain any provisions regarding the role of the EU Court of Justice in enforcing the Protocol or in controversial areas such as government subsidies and VAT rules in Northern Ireland.

¹¹ Sanitary and phytosanitary checks and Points of Entry. Available at: <https://www.daera-ni.gov.uk/articles/sanitary-and-phytosanitary-checks-and-points-entry> (1. 7. 2023).

¹² Northern Ireland Protocol: Implementation, grace periods and EU-UK discussions (2021-22). Available at: <https://researchbriefings.files.parliament.uk/documents/CBP-9333/CBP-9333.pdf> (1. 7. 2023).

¹³ Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5215 (1. 7. 2023).

Negotiations between the UK and the EU have continued since the publication of the Commission’s proposals; however, no practical progress has been achieved. The lack of significant progress in the discussions has led to the fact that the UK government published a Northern Ireland Protocol Bill on 13 June 2022¹⁴. Announcing the introduction of the bill, Minister Liz Truss said: “This is a reasonable, practical solution to the problems facing Northern Ireland. The bill will protect the EU Single Market and ensure that there is no hard border on the island of Ireland. We are ready to achieve this through negotiations with the EU. But we can make progress through negotiations only if the EU is ready to change the Protocol itself — at the moment they are not doing that. At the same time, the serious situation in Northern Ireland means that we cannot let the situation go with the flow.”¹⁵

According to the UK government, the Bill offers solutions in four key areas:

- eliminating unnecessary costs and paperwork for businesses trading in the UK, while ensuring full verification of goods imported into the EU;
- business entities should be able to place goods on the Northern Ireland market in accordance with the UK or EU commodity rules to ensure that Northern Ireland consumers will not be deprived of the opportunity to buy British goods, including due to differences in UK and EU rules;
- guarantees that Northern Ireland can benefit from the same tax benefits and financial measures as the rest of the UK, including a reduction in VAT on energy-saving materials and loans for restoration in the post-pandemic period;
- normalization of governance mechanisms so that disputes are resolved by independent arbitration, and not by the EU Court of Justice.

The UK Government has also published a special document outlining its position that the Bill complies with international law (UK Government, 2022).

The European Commission has responded to the introduction of the Northern Ireland Protocol Bill, indicating that it will seek to ensure further implementation of the Protocol, as provided for in the Withdrawal Agreement. In addition, the Vice-President of the European Commission, Maroš Šefčovič, indicated that the Commission would take “proportionate actions” in response to such approach by the British government to fulfilling its international obligations.¹⁶

¹⁴ Northern Ireland Protocol Bill. Available at: <https://bills.parliament.uk/bills/3182> (1. 7. 2023).

¹⁵ Government introduces bill to fix the Northern Ireland Protocol: Press release. Available at: <https://www.gov.uk/government/news/government-introduces-bill-to-fix-the-northern-ireland-protocol> (1. 7. 2023).

¹⁶ Statement by Vice-President Maroš Šefčovič on the UK government’s decision to table a bill

On 15 June 2022 the European Commission announced that the previously suspended litigation against the UK government, resulting from unilateral actions by the UK to extend grace periods, will be resumed. In addition, the Commission announced that a new case has been initiated against the UK government in connection with the alleged inability of the UK to implement border control posts in Northern Ireland ports, as well as to provide real-time data on the movement of goods between the UK and Northern Ireland.¹⁷ Šefčovič pointed out that “trust is built on compliance with international obligations. Acting unilaterally is unconstructive. Violation of international agreements is unacceptable. The UK does not comply with the Protocol. That’s why today we are starting this infringement proceedings. The EU and the UK should work together to solve the practical problems that the Protocol creates in Northern Ireland due to Brexit. I remain convinced that if there is a genuine political will to make the Protocol work, we will be able to achieve our goals. I urge my colleagues from the UK to act in good faith and explore the full potential of the solutions we have proposed. Only joint solutions will create the legal certainty that people and businesses in Northern Ireland deserve.”¹⁸

5. Trying to Fix It: Windsor Framework

However, in order to level the previously identified problems in the implementation of the Protocol on Ireland / Northern Ireland and issues related to Northern Ireland, on February 27, 2023, after a meeting between British Prime Minister Rishi Sunak and President of the European Commission Ursula von der Leyen, the Windsor Framework (Windsor Framework) was concluded in accordance with Arts. 16 and 17 of the Protocol. The Windsor Framework was formally adopted on March 24, at the Joint Committee on the Withdrawal Agreement meeting in London as it did not formally require the approval of the British Parliament¹⁹.

The Windsor Framework does not change the fundamental legal norms of the Protocol on Ireland/Northern Ireland. Nevertheless, it concerns the Protocol’s implementation in practice due to some simplification of the movement of

disapplying core elements of the Protocol on Ireland/Northern Ireland. Available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_3698 (1. 7. 2023).

¹⁷ Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland: Press release. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3676 (1. 7. 2023).

¹⁸ *Ibid.*

¹⁹ UK and EU to formally adopt the Windsor Framework. Available at: <https://www.gov.uk/government/news/uk-and-eu-to-formally-adopt-the-windsor-framework> (25. 3. 2023).

goods between the UK and Northern Ireland, taking into account the new decision of the Joint Committee and the proposed EU legislation (Windsor Framework). Although the UK government’s statement that the agreement “cancels” 1,700 pages of EU legislation regarding Northern Ireland is technically incorrect, it is fair to say that in many cases integration law will no longer apply *de facto*, even if it should be applied *de jure* (Peers, 2023).

In accordance with the Windsor Framework, some changes in the legal regulation of the territory of Northern Ireland will be implemented by unilateral acts of the EU, and not by joint decisions of the UK and the Union. This increases the likelihood that the application of newly adopted EU regulations may be rejected based on the application of the Stormont Brake procedure. This legal mechanism gives the Northern Ireland Assembly the right to object to changes in EU acts that apply in Northern Ireland. According to the established procedure, 30 members of the Northern Ireland Assembly from at least two parties must notify the UK Government of their objections to the amendment or replacement of EU acts that apply in Northern Ireland in accordance with the Protocol on Ireland/Northern Ireland. They mainly relate to the rules of goods, and not to the amended or replaced laws relating to state aid, the single electricity market or most of the EU Customs code.

However, despite the enthusiasm for the conclusion of a new agreement between the EU and the UK, many researchers express scepticism about the success of the new agreement and its ability to solve all the problems between the UK and the EU regarding Northern Ireland. In particular, the preliminary legal analysis conducted by J.F. Larkin, Attorney General of Northern Ireland in 2010-2020, points out that the provisions of the Windsor Framework Agreement not only do not comply with the constitutional Acts of the Union of 1800, but also do not strengthen constitutional guarantees regarding the constitutional status of Northern Ireland (Thoburn *et al.*, 2023).

6. Conclusion

It seems that the practical implementation of the special arrangements for Northern Ireland and their impact on the region will be the dominant topic in the coming years. Many provisions raise questions of interpretation, implementation, and enforcement. The decision to empower the Northern Ireland Assembly to implement special procedures for the expression of democratic consent attracted a lot of attention, while its prospects were questioned. However, this means that the Protocol and the practices it creates will occupy a prominent place in public life for many years to come.

The task of proper implementation of the Protocol on Northern Ireland is also complicated by the fact that the UK and the EU are moving in different directions, seeking to find some form of settlement of the fragile situation of Northern Ireland that satisfies all parties. Although the UK and the European Union initially recognized the region's problems in the context of Brexit, they disagreed on many other issues. The first year of the Protocol's implementation largely reflected the process of its approval and adoption, in which a significant number of disagreements were of a political nature.

In addition, the tension that the application of the Protocol can create in economic relations between Northern Ireland and the rest of the UK should not be underestimated. Trade between the two shores of the Irish Sea is not unimpeded after the end of the transition period in accordance with the provisions of the Withdrawal Agreement considered. Goods imported from the UK to Northern Ireland may even face tariffs if they are deemed to be "at risk of subsequent movement to the Union". The extent of obstacles to trade within the UK will depend on the development of future relations between the UK and the EU. The greater the Europeanization of the legal regime of trade between the parties, less friction there will be in trade between Northern Ireland and its metropolis. The more they deviate from the regulatory impact of the EU, the more significant obstacles will be created in the UK domestic market. The initiated Windsor Framework Agreement confirms this, and also points to the UK's attempts to "work on mistakes", normatively minimizing the negative consequences of leaving the European Union. Nevertheless, it is precisely in such a situation that the threat to constitutional and territorial integrity becomes more and more tangible and urgent.

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REVISION (SECOND APPEAL ON THE POINTS OF LAW) IN SERBIAN LITIGATION PROCEEDINGS**

Summary

Revision is an extraordinary legal remedy in Serbian litigation proceedings that enables access to the Supreme Court in litigation proceedings. This paper examines whether the provisions on the second appeal in litigation proceedings are adequate to enable the Supreme Court to fulfil its role – the unification of the case law. The focus of the analysis is the admissibility criteria for the second appeal that constitute filters for accessing the Supreme Court. It has turned out in practice that the filters are not only excessively permeable but inadequate too. A similar problem occurred in the Republic of Croatia and the Republic of Slovenia which is why the law of these countries was analysed in this paper. Recent draft amendments to the CPA are a step forward in reforming the second appeal in Serbia, even though there are provisions that could be improved.

Keywords: admissibility criteria, role of the Supreme Court, ex-Yugoslav countries, second appeal on the points of law.

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REVIZIJA PROTIV PRESUDE U PARNIČNOM POSTUPKU

Sažetak

Revizija protiv presude je vanredni pravni lek u parničnom postupku o kome odlučuje Vrhovni sud Republike Srbije. U ovom radu je analizirano da li su odredbe o reviziji u parničnom postupku adekvatne da omoguće Vrhovnom sudu da ispuni svoju ulogu obezbeđivanja jedinstvene primene prava na teritoriji države. Praksa je pokazala da uslovi za dozvoljenost revizije kao filteri za pristup Vrhovnom (doskoro Vrhovnom kasacionom) sudu nisu adekvatni, kao i da su previše propusni, što je dovelo do preopterećenosti najvišeg suda u zemlji. Slične probleme su imale i Republika Hrvatska i Republika Slovenija pa su rešenja ovih prava analizirana u radu. Najzad, analiziran je i nacrt izmena i dopuna odredaba o reviziji protiv presude iz 2021. godine za koji autorka ocenjuje da bi predstavljao korak napred u reformi revizije, iako su i poboljšanja moguća pre svega kako bi se sprečila dalja preopterećenost Vrhovnog suda.

Ključne reči: revizija, dozvoljenost revizije, uloga Vrhovnog suda, pravo zemalja bivše Jugoslavije.

1. Introduction

Changes in the rules governing the revision¹, particularly the special appeal², was one of the core tasks of the workgroup for drafting the Act amending the Civil Procedure Act ('CPA'). The reason therefore was also the need to improve the efficiency of the proceedings before the then Supreme Court of Cassation³ ('SCC'). Namely, a huge caseload of special appeals was most often rejected as inadmissible⁴. However, it backlogged the SCC. In practice, apparently, the special appeal has become a remedy frequently filed. Therefore, even though Art.

¹ Several terms are being used as translations from the Serbian Revizija and similar remedies in litigation proceedings. Some of these are "second appeal on the points of law," "further appeal on the points of law," or just simply "revision" as translated by Prof. Aleš Galič in his book about civil procedure in Slovenia (Galič, 2019, 309-311). Both terms revision and the second appeal will be used in this paper interchangeably.

² In Serbia, there are two subtypes of revision: general appeal and special appeal.

³ Supreme Court of the Republic of Serbia, since 2023.

⁴ As much as 95% of cases according to data in the text of the SCC Initiative to amend the provisions of the Civil Procedure Act governing general and special appeals.

404 of the CPA provides for the second appeal to be permitted only exceptionally, the practice neglects exceptionality which comes down to a rule when the general appeal is not permitted.

Such practice does not correspond to the second appeal objectives. Therefore, amendments are required. Namely, the Supreme Court should be the one to decide on the major issues rather than be a third instance which, usually, follows the second one. The question is how in-depth such amendments should be – whether only to modify the existing second appeal rules or change the entire concept of the second appeal, i.e., extraordinary remedies. Finally, the question is whether the second appeal objectives are set appropriately, or they should be modernized.

Considering the intended amendments to the CPA, the professional community has focused on this issue. Recent discussions and papers concerning revision lack a comparative law analysis that would result in valuable conclusions regarding the second appeal rules in Serbian litigation proceedings. Comparative law in this area is diverse. However, what we find most interesting is the development of the second appeal rules in the former SFRY countries with which we have a shared tradition. Special focus should be on Slovenia's and Croatia's law as these countries have relatively recently reformed their second appeal rules for similar reasons underlying the necessity for modifying the second appeal rules in Serbian law.

2. Scope of Application of the Second Appeal in Serbian Law

The central issue that the reform of the second appeal rules revolves around is the question of the admissibility conditions for the second appeal that constitute filters for accessing the Supreme Court. It has turned out in practice that the filters are not only excessively permeable but inadequate too. As a result, a huge caseload is brought before the Supreme Court, but second appeals are rejected due to inadmissibility in a disproportionately large number of special appeal cases. Therefore, the Supreme Court is backlogged, but primarily with cases in which it does not fulfil its function. This is not a new problem. On the contrary, it has tagged along with the Serbian judiciary for a long time which is attested to by the history of second appeals in litigation proceedings. The scope of application of the second appeal has often been changed in an attempt to resolve this issue.

As the scope of application of the second appeal changed in Serbian law, so did the access to the highest court in the litigation proceedings. The issue of backlogging the Supreme Court and how it affects the authority of the judiciary, i.e.,

the highest court in the country, has been standing out as a motive for changes to the second appeal rules ever since the SFRY era (Poznić, 2009, p. 952). The scope of application of the second appeal depends on the definition of the admissibility conditions for the second appeal which serve as the filters for accessing the Supreme Court. If the filters are inadequate, then the access is either too broadly defined so that the Supreme Court is reached by such cases that are ineligible or too narrowly defined that it fails to encompass such cases that are eligible for accessing the second appeal court. To be able to define the filters, and hence anticipate the scope of application of the second appeal, we need to know what the second appeal objectives are, which will be addressed below.

3. Development of the Admissibility Criteria in Serbian Law

The scope of the second appeal has been changed ever since the 1956 Civil Procedure Act. Under this act, the second appeal was an ordinary remedy (Marković, 1957). Namely, after the takeover of power post-WW2 and the set-up of a new economic system, the decision was made that the system of remedies, as existed per Austrian model that included the second and third instance, was unfit for the new economic system introduced post-1950 (Kamhi, 1967, p. 345). Therefore, after the war the proceedings were at first conducted in two instances (Rakić-Vodinelić, 1981, pp. 79-80) and then the 1956 Civil Procedure Act reintroduced the second appeal, but as an ordinary remedy. The act stipulated the conditions for its admissibility (Kamhi, 1967, p. 368). Then the 1965 amendments significantly limited the second appeal (Poznić, 1970, p. 304) only to have its scope expanded again in the 1976 Act (Poznić, 1977, p. 579). The 1965 amendments limited the second appeal so that it could be filed in one situation only – when the second-instance court decided on the basis of the facts that differ from the facts ascertained by the first-instance court. Such an unusual solution had not been encountered in comparative law (Poznić, 1970, p. 304). The grounds for narrowing the scope of the second appeal concerned disburdening the highest courts and enhancing procedural efficiency back in the SFRY, as well.

The 2004 CPA – Art. 395, in addition to the general appeal, stipulated the special appeal the admissibility of which was decided by the appellate court and the direct appeal, i.e. an appeal with an alternative motion to decide in second appeal proceedings (Art. 389 2014 CPA). The 2009 amendments considerably narrowed the possibility to file a second appeal by increasing the proprietary census for filing a general appeal. The scope of application of the second appeal was further expanded by the applicable CPA, i.e., its 2014 amendments – Art. 13.

4. Unrestrained Increase of Second Appeal Cases

The possibility to file a second appeal was more broadly determined by the CPA than it had been the case in the time period preceding the 2014 amendments. Since then, the number of proceedings before the SCC continuously grew from 9161 in 2014 to more than 20,000 in 2015 and 2019 to 14,046 received cases in 2020 (2020 Annual Activity Report of the SCC, Belgrade, 2021). Occasional leaps to over 20,000 could be explained by the widely known problem of mass claims in the Serbian judiciary (Association of Judges and Prosecutors in Serbia, Information published 18th February 2021). However, apart from this argument, there was a continuous rise in inflowing cases before the SCC.

From the 2020 SCC statistics, it can be concluded that the highest inflow of cases is recorded in civil matters, while it is many times lower in criminal matters and eventually in other cases. As inflowing cases increased, so did the share of special appeal cases in the total number of second appeal cases from 28.5% in 2016 to 56.8% in 2019 (Initiative by the Session of All Judges of the SCC to amend the Civil Procedure Act of 25 December 2019, 4).

As a result of a higher inflow and a continuous increase since 2014 onward this court also faced a growing number of unresolved cases from 3582 in 2014 to 9642 in 2020. With a minor drop in 2017, the increasing number of cases was continuous. Therefore, according to all statistical criteria, the SCC backlog consistently grew.

The overwhelming backlog, by all accounts, made the Session of All Judges of the SCC launch an initiative for amendments to the CPA. The proposed amendments are aimed at limiting the scope of the second appeal. Namely, it is proposed that the provision of Art. 403(2)(2) and (3) be deleted, and the provision of Art. 404 of the CPA be amended, i.e., the admissibility conditions for the second appeal be specified. The objective of the proposed amendments is to unburden the Supreme Court and discontinue the growing inflow of cases. We have seen that this problem is not new in our law, and that there have been attempts at its resolution before.

5. Role of the Supreme Court

Clearly, the Supreme Court cannot exercise its function duly if backlogged. Namely, a huge caseload of special appeals not even ruled on merits prevents the achievement of the core objective of introducing the second appeal in the first place, that is, reinforcing the role of the highest judicial instance in ensuring uniformity in the law and legal certainty (Stanković, 2004, p. 29). According to the ECtHR,

the Supreme Court should “deal only with matters of the requisite significance” (ECtHR Case 2611/07, 15276/07, para 54). Therefore, the filters to be set by the legislator should be such as to provide access to the second appeal court to the cases that are important, not only in the interest of the parties thereto but in the general interest as well. Today, the objectives in comparative law are quite similar.

The 2021 ELI/UNIDROIT Model European Rules on Civil Procedure state in Rule 172 that second appeal proceedings may be instituted with a view to correcting a violation of fundamental human rights, securing uniformity in the law, resolving a legal issue which is not limited to the case at hand but is of general importance or to developing the law. It is further stated that the court itself may decide whether the permissibility conditions for the second appeal have been fulfilled. So, the second appeal function is determined primarily as public – permitted in situations where the Supreme Court would decide on issues of general importance, and only sporadically private – to achieve individual justice for the parties to litigation proceedings (Bratković, 2018). Such function of second appeal proceedings is justified by the Supreme Court’s role which is also significant in the systems not founded on common law because decisions of the highest court in the country enjoy great authority in the judiciary.

6. How to Choose Filters for Accessing the Second Appeal Court?

If we start from the second appeal objectives and the role of the Supreme Court, we can check if the existing admissibility conditions stipulated by the CPA are adequately regulated. Namely, the current law includes a general appeal with the admissibility conditions that pertain to the value of the dispute’s subject matter, but also to the second-instance court decisions reversing a judgment and deciding on the parties’ claims, i.e., the second-instance court decisions adopting an appeal, revoking a judgment, and deciding on the parties’ claims, and when it is defined so by a special act. In addition, a special appeal is stipulated. A special appeal is exceptionally permitted due to a misapplication of substantive law and against a second-instance judgment that could not be challenged by a general second appeal if, as assessed by the Supreme Court, it is necessary to address legal issues in the general interest or legal issues in the interest of equality of citizens, in order to harmonize jurisprudence, or if a new interpretation of law is required.

Therefore, the second appeal under the current law predominantly serves the private interest, i.e., achieves justice for the parties if filed as a general appeal, while the special appeal is primarily intended to achieve the public interest. However, ruling in general appeal proceedings prevailed in practice. Even though the

number of special appeals is not low, a high share of them is rejected. Therefore, the second appeal proceedings are such that the foregoing public function is not sufficiently fulfilled. In addition, the caseload before the Supreme Court is disproportionately large and the admissibility conditions for the second appeal do not adequately function as the filters for accessing that court.

Namely, the highest court in the country rules in second appeal proceedings as an extraordinary remedy. Access to a third-instance court is not guaranteed by the European Convention on Human Rights within the guarantee of the right to a fair trial and the right of access to a court as its integral part. However, when proceedings before a higher-instance court are stipulated, then all guarantees under Art. 6(1) of the ECHR apply in such proceedings (Jakšić, 2012, p. 83).

Still, review by the Supreme Court should not be unlimited because the decision to be reviewed in second appeal proceedings has become final. Thus, if the access is restricted and if the grounds for the second appeal are limited, second appeal cases should not be as many as to obstruct the Supreme Court's functioning. The related criticism sounded by the judicial community that the second appeal court has become another appeal instance, even though it should not be so, is justified. Such a system of the "second appeal" benefits the instances-mentality which in the event of the countries resulting from the break-up of the SFRY is the legacy of the socialist country litigation system pursuing substantive truth (Bratković, 2018, p. 51). The instances-mentality persevered, but the court's task in the present litigation is different (Bratković, 2018). The victims of such situation are also the interpretations of the admissibility conditions for the special appeal giving rise to overwhelming the Supreme Court of Cassation with a huge caseload of special appeals most of which get rejected. As stated by Bratković, the instances-mentality is one of the reasons for resisting the limitation of the scope of the second appeal in Croatia (Bratković, 2018, pp. 335-336), and in other countries of the former SFRY for that matter, and at the same time for reforming the second appeal by limiting its private function. Finally, it is when second appeal proceedings are stipulated that such remedy is used to ensure the fulfilment of the conditions for exhaustion of remedies for instituting further proceedings.

The resolution of such problem was proposed in 2021 when the Ministry of Justice published the Draft Act amending the CPA on its website.

7. Draft Act Amending the CPA

Both SCC and Ministry of Justice of the Republic of Serbia have been working on the proposal of amendments to the CPA. After the initiative by the Session of All Judges of the SCC had been launched to amend the CPA, the Ministry

of Justice of the Republic of Serbia assembled the workgroup for drafting the Act amending the CPA. The draft also contained proposed amendments concerning the second appeal (Bodiroga, 2021, pp. 159-163). The workgroup proposed amendments to the general appeal rules so that the amount in dispute would no longer be a criterion for the second appeal admissibility, while a second appeal could be filed against an appellate court judgment: when required so by a special act; when the appellate court reversed a first-instance judgment and decided on the parties' claims; when the appellate court adopted an appeal, set aside a first-instance judgment and decided on the parties' claims. Therefore, the proposal by the workgroup was to eliminate the amount in dispute as an admissibility criterion, but at the same time to specify that the second appeal would be permitted only against appellate courts' decisions.

7.1. The Amount in Dispute as Admissibility Criteria

It was none other than the second appeal census that was the core criterion in our law for accessing the second appeal court for a long time. It was also applied in other legal systems, kindred to ours, such as the German legal circle, and in the countries resulting from the break-up of the former SFRY. The amount in dispute as a filter for accessing a second appeal court is not an illegitimate means of limiting access to the highest judicial instance. This was also confirmed by the European Court of Human Rights in the case *Dobric vs Serbia* (ECtHR Case 2611/07, 15276/07, para 54). However, the question is whether it is adequate.

The adequacy of this filter depends on how the second appeal function is understood. If the second appeal function is more private, i.e., such that the parties achieve justice in individual cases that are of greater importance to them, then the filter is adequate. If the second appeal function is more public, then this means of limiting access to the ECtHR will be inadequate. The tendency to cancel the amount in dispute as an admissibility criterion for the second appeal has long been present in comparative law of the procedural law systems similar to ours. In the Federal Republic of Germany, the amount in dispute was cancelled as an admissibility criterion for the second appeal back in 2001. The second appeal remained a remedy used by parties, but access to a second appeal court was generally limited to the general interest (Rosenberg *et al.*, 2010, p. 819). A change in the paradigm is also present in the countries of the former SFRY, so Slovenia, followed by Croatia, both abandoned the amount in dispute as an admissibility condition for the second appeal and redirected the role of the Supreme Court more towards the general interest.

7.2. Other Admissibility Conditions for the Second Appeal

According to the Draft Act, the second appeal would be permitted only when the appellate court has reversed a judgment and decided on the parties' claims, i.e., if the appellate court has adopted an appeal, set aside a judgment, and decided on the parties' claims. In addition, the second appeal is permitted when provided so specifically by the law. Such general appeal is aimed at providing a possibility for a third instance when the first two have disagreed in judgment (Bodiroga, 2021). Apart from that, the grounds on which a general appeal may be filed remain the same, considering no amendment to Art. 407 has been proposed. Therefore, the starting point for this admissibility condition is that the position of a party thereto changed after the second-instance decision had been taken, but it did not require a more general importance as in the case of the admissibility grounds for the special appeal. So, this has left a narrowed scope for fulfilling the second appeal's private law function which is further fulfilled through checking the same grounds for the second appeal as it had been the case earlier. The Supreme Court's public role would come second here as it would be fulfilled indirectly through ruling in these cases. If such a draft were adopted in the legislative procedure, the second appeal would maintain its private function which would exist in its narrow form on the same grounds as before.

In addition, the proposed amendments concerned the special appeal, i.e., instead of the present conditions they proposed the introduction of itemised admissibility conditions for the special appeal. Namely, the proposed amendments in Art. 420a stipulate that a second appeal may be exceptionally filed due to a misapplication of substantive law if "the ruling on a second appeal *is required* to consider legal issues of importance for ensuring uniformity in the law and equality of all in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence". The specificity of proposed amendments is reflected in the legislator itself itemizing when such a need arises. So, Art. 420a(2) details this issue, and the foregoing admissibility conditions are specified and exist: "in the event of a legal issue decided by an appellate court judgment contrary to the Supreme Court of Cassation's established jurisprudence; in the event of a legal issue relative to which no position exists in the jurisprudence of the Supreme Court of Cassation; in the event of a legal issue on which the judgments of different panels of judges of the same appellate court or different appellate courts did not take the same legal view; in the event of a legal issue for which there is uniform jurisprudence of the Supreme Court of Cassation and appellate courts but due to an international agreement concluded or changes in legislation there is a need to take a new interpretation of law and a new legal position on that issue; in

the event of a legal issue for which there is uniform jurisprudence of the Supreme Court of Cassation and appellate courts which due to the legal position taken in decisions by the European Court of Human Rights or the Constitutional Court must be reviewed.”

Even though the proposed draft special appeal rules clearly define the second appeal’s public function and the wording used is common in comparative law for the second appeal function, the proposed draft takes an unexpected turn. Namely, the act itself was clearly defined when there was a need to address legal issues of importance for ensuring uniformity in the law and equality of all in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence. There would be no room left to courts for the interpretation which is common in other countries with the procedural law systems kindred to ours (the German-Austrian legal circle and the former SFRY that have reformed the legal concept of second appeal in litigation proceedings). The legislator would be the one to anticipate and stipulate all situations where a need could arise for filing a special appeal, i.e., specify in detail when a need exists to address legal issues of importance for ensuring uniformity in the law and equality of all in its application, that is, for ensuring legal certainty or developing the law through jurisprudence.

7.3. Change of the Second Appeal Function

Given that the admissibility conditions for the second appeal as the filters for accessing a second appeal court affect the fulfillment of the second appeal function, it is necessary to analyze how the proposed change of the filters or the admissibility conditions for the second appeal would affect backlog and adequate selection of second appeal cases or what function would be exercised by the Supreme Court.

In the SFRY, the second appeal was defined as a remedy which “in addition to the goal pursued by other remedies, should also have a specific goal: to maintain equal application of the law by lower courts.” (Poznić, 2009, p. 95). Poznić further states that the achievement of this other role of the second appeal was not possible given the organisation of the judiciary and the division of competences and that second appeal proceedings were in fact the third instance of trial. According to the 1976 CPA, the second appeal was “trading off” (Triva, Dika, 2004, p. 719) against the Request for the Protection of Legality in order to achieve not only the goals of trial legality in a specific case, but also of ensuring uniformity in the law. Therefore, in Yugoslav courts’ jurisprudence, the second appeal function was not significantly different from the appeal function. In

the SFRY era, the Supreme Court's public function was fulfilled not through acting on extraordinary remedies but through adopting legal positions (Uzelac & Galič, 2017, p. 11). Some authors insisted that the second appeal objectives should be different; the SC's function in the SFRY era was defined by Rakić-Vodinešić as ensuring uniform and correct application of law, the authority of law and the judiciary, and achieving further development of law by acting in second appeal proceedings (Rakić-Vodinešić, 1981, pp. 61-69). Nonetheless, the private function of achieving individual justice for the parties was not only equally desirable as the public one but also prevailed in practice. After the break-up of the SFRY, the second appeal was changed on several occasions, but in this period its private function also prevailed in practice as it is usually the case when (i) it is statutory provided (Uzelac & Galič, 2017, p. 225).

It is evident that the presently proposed amendments to the second appeal provisions are more comprehensive than before. The previous amendments made minor interventions into the existing concept. What triggered changes to the act was the backlogging of the Supreme Court. So, the amendments could concern only the scope of the second appeal by having the filters narrowed as was done in the past when the second appeal census was reduced from EUR 100,000 in general litigation proceedings and EUR 300,000 in commercial disputes to EUR 40,000 in general litigation proceedings and EUR 100,000 in commercial disputes. Nonetheless, such changes to the proprietary census failed to yield a satisfactory outcome in practice. The most often given reasons for the then amendments were access to a second appeal court for the cases of significant value to the broader population, i.e., the exercise of the right of access to a court. However, the right of access to a court according to the jurisprudence of the ECtHR does not include a guarantee for access to a highest judicial instance. Hence, the amendments were outside the scope of scholarship, any comparative law knowledge or experience, but also contrary to the ECtHR positions, all of which is indicative of the legislator's disorientation in this area.

The change of the amount in dispute as an admissibility condition for the second appeal also reduced the scope of exercising the second appeal's private function, but it still survived. It is emphasized in the scholarship that the combination of the second appeal's private and public functions in practice hardly works because the second appeal's private function always prevails in that situation (Uzelac, Galič, 2017, p. 225). Nonetheless, it seems that such second appeal concept would still limit access to a second appeal court since the admissibility of the second appeal would depend on the type of decision and whether the first- and second-instance courts agreed. However, that approach would continue to be potentially broad and for achievement purposes the grounds for the second

appeal are not compliant with the change in the concept. Therefore, although aimed at the substantive law position, the second appeal is reviewed for the same reasons it used to be.

7.4. Supreme Court's Function in Second Appeal Proceedings

The Constitution of the Republic of Serbia does not define the Supreme Court's function further than its designation as the highest court in the country (Art. 143(2)). The Court Organisation Act in its Art. 32(1) prescribes that the Supreme Court shall decide on extraordinary remedies and in other matters defined by the act, and in paragraph 3 of the same Article it prescribes that "the Supreme Court shall ensure uniform judicial application of law and equality of the parties in judicial proceedings, examine application of the act and other regulations and operation of the courts...". This act does not further specify how this function will be fulfilled, or what the functions of extraordinary remedies are. It rests with the CPA to define in litigation proceedings.

The Supreme Court has most cases concerning civil law matters ruled in second appeal proceedings. However, based on Art. 143(3) of The Court Organisation Act it cannot be concluded that the second appeal should principally or at all have the function of ensuring uniformity in the law, equality of the parties or principally have the function of achieving justice for the parties having failed to do so in the previous instances, or that the second appeal should have the private and public functions. In addition, some Supreme Court activities serve none other than to fulfil the public function which is the adoption of interpretative opinions at a session of the Supreme Court's Civil Department. Given the share of second appeals in rulings regarding civil law matters before the Supreme Court, the determination of the second appeal also largely affects the function of the highest court in the country. If the second appeal had a significantly smaller private function of achieving individual justice for the parties to the proceedings, then there would be little room left to fulfil that function before the Supreme Court in litigation proceedings.

Considering the present concept of litigation proceedings and the fact that the court no longer pursues substantive truth (see supra p.7), it is evident why in the legal systems kindred to ours the role of the highest court in the country has changed to be mostly public. In the contemporary societies of European legal area to which we traditionally belong, the Supreme Court will fulfil its public function principally in extraordinary remedy proceedings. However, it is in second appeal proceedings that the Supreme Court cannot adequately fulfil this function. The situation was similar in other countries resulting from the break-up of the SFRY.

Applying the second appeal rules in a similar inherited legal environment, Slovenia and Croatia both faced inefficient proceedings before the highest judicial instance and merely a shadow of the court's role that it once was. To resolve these changes, Slovenia was the first, closely followed by Croatia, to modify the second appeal rules, assigning them a different function. The regulation of the second appeal leading to it being merely another appeal in practice was abandoned and this legal concept was regulated so as to transform the second appeal function into a more public function than a private one. Consequently, the highest judicial instances in these countries are disburdened of a huge influx of cases.

It was first Slovenia and then Croatia that introduced the second appeal by permission in order to reinforce the second appeal's public function and reduce the pressure of a huge caseload. Consequently, supreme courts are not expected to act in proceedings as on any other appeal, but to exercise the public function.

8. Slovenia and Croatia

The Republic of Slovenia and the Republic of Croatia have reformed the concept of the second appeal and introduced the second appeal by permission. These countries are the ones we share legal traditions with. However, a growing number of legal systems opt for a different approach where the second appeal's public function prevails in order to solve the problems of backlogging the highest judicial instance with second appeals that are doomed to fail (Bratković, 2018). For example, the 2001 German reform included the second appeal apart from other filters, only by permission of the then appellate or second appeal court when the importance of such a second appeal exceeds the personal interest (Rosenberg *et al.*, 2010, p. 819).

Thus, Art. 382 of the Croatian Civil Procedure Act prescribes that the parties may file a second appeal against a second-instance judgment if the Supreme Court permitted the filing of a second appeal. Similarly, the Slovenian Civil Procedure Act contains in Art. 367 a provision stating that against a final second-instance judgment the parties may file a second appeal within 15 days of service of the Supreme Court's decision permitting a second appeal.

Such remedy originates from American law (Rakić-Vodinešić, 1981), but as early as in the 1970s, it was transposed into German law. Slovenia (Galič, 2019, pp. 309-311), and then Croatia reformed the legal concept of second appeal to disburden supreme courts and by doing so enable faster decision-making and better filtering of cases to be ruled by the Supreme Court. However, the consequence of this change is also a change to the second appeal function and a change in the Supreme Court's role. In the earlier system of general and special appeals

per a similar model that continues in Serbian law, the second appeal had a two-fold function – to ensure the regularity and legality of decisions and achieve uniformity in the law in the area of application (Bratković, 2016, pp. 322-323). In the first case, the individual interest prevailed, while in the second case, the general interest was primary. However, the general interest prevailed following the reform as a guiding interest of the second appeal regulation. Consequently, the Supreme Court's role became more prominent in the harmonization of jurisprudence, while the highest court's role as a third instance similar to that of an appeal instance almost disappeared.

Thus, the Slovenian CPA stipulates that second appeal proceedings are instituted by a petition to grant a leave to revision. The Supreme Court is competent to grant leave to revision that a party thereto may file within 15 days of serving the decision permitting it. The court permits the second appeal if the Supreme Court's decision can be expected to rule on a legal issue important for ensuring legal certainty, uniformity in the law or developing the law through jurisprudence. Therefore, the second appeal has a predominantly public function. The legislator further specifies in which cases the court will "in particular" permit the second appeal. However, it does not pertain to the enumeration of examples, but room is left for the court to permit the second appeal in other cases as well. The legislator accentuates the legal issue in respect of which a second-instance court decision derogates from the Supreme Court's jurisprudence, the legal issue in respect of which the Supreme Court's jurisprudence is non-existent, in particular, if the jurisprudence of higher courts is not uniform, i.e., the legal issue in respect of which the Supreme Court's jurisprudence is not uniform.

To ensure procedural efficiency, the petition to grant a leave to revision must contain stipulated elements and a party must state specifically and concretely the disputed legal issue and the legal rule that would be infringed upon, the circumstances indicative of its importance, and a brief reasoning as to why the second-instance court has ruled on such issue unlawfully; the claims of procedural violations must be described specifically and concretely, and in the same manner, the existence of the Supreme Court's jurisprudence from which the decision allegedly derogates – lack of uniformity in jurisprudence – must be demonstrated. If the party filing a second appeal invokes the Supreme Court's or second-instance court's jurisprudence, it must state the reference numbers of the cases, and enclose the copies of the court decisions it invokes if they are not made available to the public. Failure to do so results in the rejection of the notice of appeal.

Even though the provisions on the second appeal in the Croatian CPA were written based on the Slovenian counterpart, there are derogations (Bratković, 2020, p. 180). Thus, the Croatian CPA also prescribes the second appeal by

permission. The parties are authorized to file a motion for appeal, and Croatia's Supreme Court will permit the second appeal if a decision on a legal issue important for the ruling in the specific dispute can be expected, but also for ensuring uniformity in the law, equality of all in its application or developing the law in jurisprudence, in particular, if the second-instance court derogated by its decision from the jurisprudence of the Croatian SC, and if the jurisprudence of the Croatian SC is non-existent, especially if the jurisprudence of lower courts is not uniform or if under the statutory required conditions it is necessary to review the jurisprudence of the Croatian SC due to a new decision by the Croatian Constitutional Court, European Union Court or ECtHR. In addition, the Croatian SC will permit the second appeal if a fundamental human right has been violated in lower court proceedings, and a party thereto, whenever possible, has argued so. Therefore, just like the Slovenian legislator, the Croatian legislator does not close the door for the court to permit the second appeal whenever possible, but it specifies in what cases it will particularly do so.

Nevertheless, the mandatory elements of the motion for appeal are prescribed. This is the common legislative technique when increased procedural efficiency and discipline are desirable.

9. 2021 Draft Amendments - Concluding Remarks

The Serbian Draft amendments CPA still retains both general and special appeals. Even though the Draft CPA has obviously been written under the influence of Slovenia's and Croatia's law. However, this influence is not substantial.

Thus, the special appeal will be permitted due to a misapplication of substantive law to address legal issues of importance for ensuring uniformity in the law and equality in its application, i.e., for ensuring legal certainty or developing the law through jurisprudence. The change is proposed on how to define the notion of 'special appeal'. It is proposed that "issues of the general interest" should no longer be included in the designation of "special appeal", while the entire definition is virtually identical to that of the second appeal by permission in Slovenian and Croatian laws.

It is followed by an itemization of admissibility conditions for the special appeal. The grounds are very similar to those stated in the Croatian or Slovenian act, except that the acts do not itemize when the second appeal is admissible but state the conditions when it will be permitted in particular. Since the itemization of the admissibility criteria is rather untypical, it is hard to assess the effects that such a provision would have in practice.

It is safe to assume that this should address an acute problem in our legislation. This problem is too broad interpretation of the admissibility conditions for the special appeal. Itemizing the admissibility criteria is how this problem is to be alleviated. The intention is to “rescue” the judiciary from any future excessive influx of special appeals that would be rejected in 95% of cases. However, the possibility to permit the second appeal in a situation not provided for by the legislator is being lost. Such an approach is unusual in other legal systems we normally look up to even though specific elements are like those in comparative law.

The question is whether the existing concept of the second appeal that was changed with this is in fact only reshaped to alleviate the problems in practice rather than actually changed. Aversion towards judicial discretion is the legacy of the socialist SFRY (Galič, 2015, pp. 99-124). Nonetheless, the formalistic approach in that era existed within pursuance of substantive truth in litigation proceedings, while in present-day Serbia, an excessively formalistic approach and overly detailed legal regulation are what can yield a totally opposite result.

Would this approach make Serbia move closer to hyper positivism, in which the linguistic and logical interpretation is prioritized over other methods, and the judge is seen as a mechanism for subsuming facts under a norm (Manko, 2013, p. 7), or is this just a pragmatic approach to resolve the backlog? In theory, it relies on the Soviet legal theory where law comes down to whatever is prescribed by authorities, while the law created by judges, the application of general legal principles or good practice are reduced (Manko, 2013, p. 8). But would the special appeal admissibility criteria actually be a good example of hyperpositivism? The difference between itemizing and specifying is not big in this provision and the answer is no.

We can ask the question of how the legislator is to solve the problem of a huge caseload of special appeals overwhelming the Supreme Court if not in the described manner. Certainly, barriers need to be created to bring about a special appeal being filed subject to the highest professional and ethical standards in order to lessen abuses that are frequent.

The barriers set by the legislator should normally serve legal certainty or enable the proper course of proceedings. According to the position of the ECtHR, that is the case with the mandatory representation by legal counsel in the proceedings initiated on the basis of an extra-ordinary remedy (ECtHR judgment no. 3067/08 of 11 February 2013, p. 51). These objectives (legal certainty and enabling proper course of the proceedings) should also be the guidance when writing the mandatory elements of the special appeal.

Furthermore, the Draft stipulates the mandatory elements of the special appeal in a very detailed manner. For example, it distinguishes between the

ECtHR and Constitutional Court decisions that only need to be indicated, while the appellate court decisions invoked by the party need to be submitted. Such a desire for detailed and clear regulation may put the parties in an unfair position. The issue of the availability of jurisprudence may be changed and it should not be a change giving rise to instituting an amendment procedure for the act. Once again, the legislative technique is different in Croatia and Slovenia. In Slovenia, in the event of a claim that jurisprudence is not uniform, the party undertakes either to submit the decision it invokes or to indicate it as required. In Croatia, as we have seen, the party undertakes to submit such a decision if it is not publicly available. Once again, Serbian proposal is a very detailed regulation.

Serbian draft law cannot be designated as hyper-positivistic. However, it does have a judiciary-centered perspective and a high level of formalism, which are all distinctive features of „Mediterranean legal systems“ (Uzelac, 2009).

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UPUTSTVO AUTORIMA

PRIJAVLJIVANJE RUKOPISA ZA OBJAVLJIVANJE

Autori mogu da dostave radove napisane latiničkim pismom na srpskom ili na engleskom jeziku u elektronskom formatu, kao *Word* dokument. Rokovi za predaju radova su: za prvi broj – 15. februar, za drugi broj – 15. maj, za treći broj – 15. avgust i za četvrti broj – 15. novembar. Rukopisi se dostavljaju putem linka: <http://aseestant.ceon.rs/index.php/spz/>, izuzetno elektronskom poštom na adresu uredništva: **redakcijaspz@gmail.com**, koje će ih uputiti kako da se prijave na sistem *Assestant* (CEON). Autori tom prilikom daju i autorsku izjavu. U slučaju dostavljanja koautorskih radova, korespondencija se u ime svih autora odvija sa autorom koji je rad poslao i koji će biti odgovoran za komunikaciju sa ostalim autorima (tzv. autor za korespondenciju). Autorskom izjavom autori garantuju da su prihvatili uređivačku politiku časopisa i da su prilikom izrade rada i njegovog prijavljivanja za objavljivanje poštovali etičke standarde publicistike i naučnog rada.

Očekuje se da autori u radu, kako bi ostvarili naučni doprinos, poštu od rezultata već sprovedenih istraživanja na datu temu, konsultujući relevantnu domaću naučnu i stručnu literaturu na sistematičan način, moguće korišćenjem digitalnih repozitorijuma domaćih naučnoistraživačkih organizacija i drugih zbirki naučnih i stručnih publikacija u otvorenom pristupu.

Sve aktivnosti vezane za uređivanje časopisa (od prijema rukopisa do objavljivanja elektronskog izdanja časopisa) obavljaju se posredstvom elektronskog sistema *Assestant* (CEON) koji omogućava pripremu i objavljivanje časopisa u elektronskom obliku (*Open Journal Systems* – OJS). U slučaju da autor nema nalog, potrebno je da se registruje preko linka: <http://aseestant.ceon.rs/index.php/spz/user/register>. Detaljno uputstvo za registraciju autora i prijavu rukopisa može se preuzeti sa sajta časopisa *Strani pravni život* (www.stranipravnizivot.rs). Navedene aktivnosti se obavljaju unutar samog sistema, pod nadzorom glavnog i odgovornog urednika i tehničkog urednika, a ključna obaveštenja koja su namenjena autorima, recenzentima ili drugim korisnicima automatski se prosleđuju elektronskom poštom. Zahvaljujući sistemu *Assestant* (CEON) obezbeđeno je čuvanje svih verzija objavljenih radova i odbijenih radova u elektronskoj bazi podataka. Autori, takođe, mogu da se upoznaju u svakom trenutku sa tokom i ishodom postupka recenziranja.

NAPOMENE VAŽNE ZA PRIPREMU RUKOPISA

Način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života* uređen je ovim uputstvom. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako prilozima ne bi bili eliminisani nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Oni moraju sadržati podatke o autoru, naslov, sažetak, ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, rezimea i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku sadrže prevod naslova, sažetka i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman, veličina 12pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvaćće se duži rukopis i to obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, sažetak (do 800 karaktera sa razmacima), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka. Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (koji sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocijata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i **naučnu kritiku ili polemiku**, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 znakova sa razmacima. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 znakova sa razmacima), ključne reči (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne računavaju se u obim rada.

Ostali prilozima. Komentari sudskih odluka mogu da imaju najviše do 15.000 znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta

Svi prilozi moraju biti sačinjeni u Microsoft Word-u, latiničkim pismom, fontom Times New Roman, veličine 12 pt, sa proredom 1,5, na strani formata A4, sa uvlačenjem pasusa za 1 tabulator, bez deljenja reči na slogove (hifenacije). Posle svakog znaka interpunkcije staviti samo jedan razmak. Za posebna slova iz srpskog i stranog latiničkog pisma koriste se raspoloživi simboli – dijakritički znaci. Ćirilički znaci iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: <https://www.loc.gov/catdir/cpsd/roman.html>. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu (na primer imena iz ruskog jezika). Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Strani pojmovi pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa preciznošću prevesti na srpski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema stilu citiranja i referenciranja – Harvard britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Ime, srednje slovo i prezime autora (jednog ili više njih) navode se na prvoj strani rukopisa u gornjem levom uglu. Pišu se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijakritičkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose na autore: naučna i stručna zvanja, akademske titule, ORCID broj autora, naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove (grad i država) u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

Istraživački podatak / istraživački projekat. Autor može nakon naslova uneti posebnu fusnotu u kojoj će navesti tačne, potpune i aktuelne podatke o okolnostima pod kojima je rad nastao (u okviru međunarodne saradnje, međunarodnog programa, kao deo naučnog ili istraživačkog projekta, u okviru postdiplomskih studija ili postdoktorskih studija, kao saopštenje sa održanog naučnog skupa, gostujuće predavanje i slično) i/ili naznaku o instituciji, državnom organu ili međunarodnoj organizaciji koja je finansijer ili korisnik projekta.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imala učešća u istraživanju ili su pomagala u priređivanju rada, sa objašnjenjem njihove uloge. U fusnoti se može navesti i obaveštenje da je rad urađen u okviru određenog naučnoistraživačkog projekta, da je ranije usmeno izlagan na naučnom skupu i slično.

Naslov rada piše se malim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10 do 12 reči.

Sažetak se navodi ispod naslova članka. Sažetak ne sme da bude duži od 800 znakova sa razmacima. Veličina fonta je 11 pt (složeno kurzivom). U sažetku autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretraživanje članaka.

Gljučne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati pet ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt, kurzivom).

Naslov rada, Sažetak i ključne reči na engleskom jeziku (ako je članak na srpskom jeziku), **odnosno, na srpskom jeziku** (ako je članak na engleskom jeziku) navode se dva reda ispod.

Podnaslovi u tekstu se pišu na sredini, malim slovima i podebljanim (boldiranim) slovima, veličine 12 pt i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima. Podnaslovi drugog reda se pišu podebljanim (boldiranim) slovima, složeno kurzivom. Podnaslovi trećeg reda se pišu kurzivom.

Tabele, grafikoni i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

NAVOĐENJE IZVORA UNUTAR TEKSTA

Od autora se očekuje da navedu korišćene izvore, i to potpuno i tačno, i da precizno prenesu tuđe navode, te se prilikom citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene strane sa kojih se preuzima tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa „p.”, a više strana sa „pp.” (skraćeno lat. *paper – pluta paper*). Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literature uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i strana). Na primer:

Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.

Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora. Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

U svom radu Ćirić (2008) konstatuje da je...

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Primeri:

U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.

Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje”. Na primer:

Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)...

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćénica „fn.”:

Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)...

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efektan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe”.

Ili:

Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe” (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili strana na kojima se nalazi citat. Tekst se može preuzeti direktno:

Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevničkih navika”.

Indirektno se isti tekst može preuzeti na sledeći način:

Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u

oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika” (Stanković, 1972, p. 307).

Dugačke citate bi najpravičnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice. Izostavljeni deo reči iz citata označava se trima tačkama u ugaonim zagradama, na primer:

Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi [...] ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)” (*Alternative zatvorskim kaznama*, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.

Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (vid. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).

U svom radu Nikolić & Čović (2018) ukazali su na...

Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je...

Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju...

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšteprihvaćena skraćenica „*et al.*” (*et alia*). Na primer:

Čeranić *et al.* (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70)... Pored „tvrde”, ne bismo smeli da zaboravimo „meku moć”... (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćenica međunarodnih organizacija ili njihovih tela, na primer:

Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, pp. 32-35).

Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)...

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

U *Teoriji države i prava* (1995, p. 204) jasno se kaže...

Rad nepoznate godine izdanja. U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

Zirojević (n.d.) ukazuje na obeležja terorizma...

Ili indirektno:

Obeležja savremenog terorizma su... (Zirojević, n.d.).

Sekundarne reference. Ako primarni izvor nije bilo moguće pronaći, nego ga autor preuzima iz rada drugog autora, mora se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se u tekstu punim nazivom (složeno običnim slovima), uz broj godine kada je usvojen, sem kada se analizira određena izmena ili dopuna propisa, kada se navodi kao izvor službeno

glasilo u kome je objavljena takva izmena. Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćena pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik.

U krivičnom zakonodavstvu Srbije (Krivični zakonik RS, 2005 – KZ).

Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, 2016).

Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (*Gesetz über die Entschädigung für von Gewalttaten* – OEG) s tim što je 1985. godine donet novi zakon koji je i sada na sanzi (OEG, 1985).

U francuskom Građanskom zakoniku (*Code civil* – CC), prema poslednjoj verziji od 1. oktobra 2018. Godine predviđeno je... (CC, 1804).

Akti međunarodnih organizacija citiraju se tako što se u tekstu navodi donosilac akta i pun naziv akta, koji se, po potrebi skraćeno, navodi u zagradi uz naznaku godine u kojoj je donet.

U Istanbulskoj konvenciji Saveta Evrope (CETS No. 210) od 11. 5. 2011. godine (CoE CETS, 2011) predlaže se...

Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, 1990)...

U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (Concil Regulation (EC), 2000)...

Na isti način kako je citiran propis naveden u tekstu, mora biti označen u popisu literature.

Autor može da koristi tekst propisa preuzet sa interneta sa službene stranice nadležnog organa ili javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. U tom slučaju u popisu literature moraju biti označeni osnovni podaci o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik (što mora biti naznačeno).

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer:

čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor u tekstu treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstave. Iza teksta autor navodi u zagradi skraćeno oznaku odluke, koja će biti korišćena i u popisu literature. Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 utvrđena je nesaglasnost... (Odluka US, 2017).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

... kako se navodi u obrazloženju Presude Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrže što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke). Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćena za nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćena „v” za veznik *versus*, npr. *Fremkin v Russia*, *Goobald v Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstave. Na primer:

Borodin v Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier – ECLI*). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015.
Intrasoft International SA v European Commission (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa interneta. Ukoliko se u radu koriste sadržaji sa interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih objavile, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže pozivanjem na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora. U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi „n.d.” (*non dated* – nepoznat datum), na primer:

Njihov značaj za parlamentarne procese je nemejljiv (Ostrogorski, n.d).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

SASTAVLJANJE SPISKA LITERATURE I POPISA PRAVNIH IZVORA

Spisak literature je obavezan na kraju rada. U spisak literature se unose sve bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

1. KNJIGE (ELEKTRONSKE), DRUGE MONOGRAFIJE I UDŽBENICI, POGLAVLJA U MONOGRAFIJAMA

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov.* Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćena „*et al.*”. Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu „ur.” (ako je knjiga izdata na srpskom jeziku), a „ed.” (za knjige na engleskom jeziku sa jednim urednikom) ili „eds.” (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu*. Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd: Institut za uporedno pravo; Banja Luka: Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI. 1997. *Promoting Probation Internationally*. Publ. no 58. Rome/London: UNICRI.
- Tappan, P. W. (ed.). 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije. Opšti deo*. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford: OUP Oxford. Database: eBook Academic Collection. Dostupno na: <http://eds.a.ebscohost.com/> (18. 1. 2019).

2. DOKTORSKE DISERTACIJE, MAGISTARSKI ILI ZAVRŠNI MASTER RADOVI

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. POGLAVLJA U KNJIGAMA I NAUČNI/STRUČNI RADOVI OBJAVLJENI U ZBORNICIMA I ZBIRKAMA RADOVA SA NAUČNIH SKUPOVA

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdava-

nja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov*. Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu „ur.” (ako je zbornik na srpskom jeziku), a „ed.” (za zbornike na engleskom jeziku sa jednim urednikom) ili „eds.” (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony?. In: Parry, R. & Omar, P. (eds.), *International Insolvency Law: Future Perspectives*. Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. & Čolović, V. (ur.), *Uvod u pravo Nemačke*. Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. ČLANCI

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa, oznaka sveske/godišta/volumena (broj)*, str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: <https://doi.org/DOIbroj>.

Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. & Čolović, V. (ur.), *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd/Valjevo: Institut za uporedno pravo, pp. 463-476.
- Gasmı, G., Prlja, D. & Jerotić, A. 2017. European leading legal principles of combating gender based violence: “Istanbul Convention”. U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. *et al.* 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida*, 20(1), pp. 45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: <https://doi.org/10.5937/spz1803065V> (18. 1. 2019).

5. ČLANCI OBJAVLJENI U ELEKTRONSKOM ČASOPISU ILI ONLINE BAZI PODATAKA

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv *online* baze podataka (datum posete stranici). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: <https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686> (18. 1. 2019).

Ili:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (18. 1. 2019).

6. ČLANCI, IZVEŠTAJI, RADOVI IZ ZBORNIKA DOSTUPNOG NA INTERNETU, KOJI IMAJU AUTORA

Članci koji su dostupni na internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa, i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vlasnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. Dostupno na: <https://www.paragraf.rs/> (18. 1. 2019).
- Lietonen, A. & Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87*. Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa

nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: <http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf> (18. 1. 2019).

7. ČLANAK DOSTUPAN NA INTERNETU KOJI NEMA NAZNAČENOG AUTORA

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- *National Action Plan to combating corruption – Mongolia*. 2016. Dostupno na: <https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption> (18. 1. 2019).

8. SPISAK KORIŠĆENIH PRAVNIH IZVORA I IZVORA SUDSKE PRAKSE

Popisuju se nazivi zakona i drugih propisa korišćenih u radu, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red. Kada se navode akti Evropske unije, obavezno se navodi broj službenog glasnika u kome je propis objavljen i strana na kojoj se nalazi:

- Krivični zakonik RS 2005. *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.
- Izmene KZ RS 2016. *Službeni glasnik RS*, br. 94/2016.
- OEG, 1985. Gesetz über die Entschädigung für Opfer von Gewalttaten, od 7. januara 1985 (*BGBI. I S. 1*), sa poslednjom izmenom od 17. jula 2017 (*BGBI. I S. 2541*). Dostupno na: <https://www.gesetze-im-internet.de/oeg/> (18. 1. 2019).
- CC, 1804. Code civil, poslednja verzija od 25. decembra 2018. Dostupno na: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721> (18. 1. 2019).
- CETS, 2011. Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS No.210) od 11. 5. 2011. godine. Dostupno na: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210> (18. 1. 2011).

- EU Decision 2010. EU Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under document C(2010) 593 (Text with EEA relevance). *OJ L* 39, 12. 2. 2010, pp. 5-18.
- Rec 2011. Council of Europe, Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care. Adopted by the Committee of Ministers on 16 November 2011.
- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćénica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke. Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier – ECLI*).

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje, 1999. Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999, dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Odluka US, 2017. Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama, *Službeni glasnik RS*, br. 68/2018.
- Cass. crim., 19 December 1991, RCA 1992.170. *Ius Commune Casebook for the Common Law of Europe*, 2018.
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